Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

TAMMY R. SABO,

Petitioner,

v.

STEVE CANTERBURY, Individually and in his capacity as Director, West Virginia Regional Jail and Correctional Facility Authority; JAMIE SPENCER, Individually and in his capacity as Warden; NORTHERN REGIONAL JAIL AND CORRECTIONAL FACILITY; WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. **Whether the Court of Appeals erred in affirming the district court's grant of summary judgment to the defendants under Sabo's Eighth Amendment Claim, when failure to follow a doctor's segregation recommendation incorporated into a Magistrate Order enhanced suicidal risks?**

II. **Whether the Court of Appeals erred in affirming the district court's grant of summary judgment to the individual defendants on the basis of qualified immunity, when the defendants violated the clearly established rights of the plaintiff under the doctor's recommendation incorporated into a Magistrate's Order, by failing to follow the order?**

III. **Whether the Court of Appeals erred in affirming the district court's grant of summary judgment to the defendants regarding the state law claims due to the inapplicability of state immunity and the establishment of the elements of the state causes of action?**

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OPINIONS AND ORDERS BELOW

The opinion and order of the Court of Appeals for the Fourth Circuit affirming the order of the District Court granting summary judgment to defendants Director, Warden, Jail, and Authority, dated March 30, 2006, was not reported and appears at Appendix p. 3A. The Petition for Rehearing and Rehearing En Banc was denied on April 28, 2006, per order appearing at Appendix p. 1A. The panel consisted of Fourth Circuit Judge Motz, Circuit Judge Shedd and Circuit Judge Gregory. The opinion and order of the District Court for the Northern District of West Virginia granting summary judgment to defendants Director, Warden, Jail, and Authority, dated June 16, 2005, appears at Appendix p. 7A.

STATEMENT OF JURISDICTION

Petitioners seek this Court's review of the judgment of the United States Court of Appeals for the Fourth Circuit entered March 30, 2006. Rehearing was requested but was denied on April 28, 2006. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner claims violations of the Eighth and Fourteenth Amendments to the United States Constitution:

> Amendment VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
>
> Amendment XIV, Section 1. All persons born or

naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case is a civil rights action under 42 U.S.C. §1983 arising from the alleged failure of jail officials to follow a Magistrate's Order incorporating medical recommendations to segregate an inmate from the general population to avoid a substantial risk of suicide in view of her diagnosis of agoraphobia and anxiety.

The complaint was based upon allegations that the defendants Director, Warden, Jail, and Authority, with knowledge of the plaintiff's medical needs, and/or with deliberate indifference to such medical needs, acted or failed to act in such a way to deprive plaintiff of necessary and adequate medical care and/or confinement conditions appropriate to her medical condition, thereby endangering the plaintiff's health and well-being. The amended complaint, filed on August 24, 2004, also alleged state tort counts of intentional infliction of mental distress, negligence, and failure to provide adequate medical care and/or confinement conditions consistent with plaintiff's medical condition. It was alleged that the defendant Jail and named personnel had refused to isolate the plaintiff from the general population and failed to regularly provide her with her prescription medication despite the existence of a Magistrate's Medication Order, as well as physician letters, ordering and otherwise requesting the same.

The case was assigned to the Honorable Frederick P. Stamp, Jr., of the United States Court for the Northern District of West Virginia who initially denied Defendants' Motion to Dismiss. Following discovery, Defendants filed a Motion for Summary Judgment which was granted by Judge Stamp on June 16, 2005. Subsequently, an appeal was taken to the Fourth Circuit Court of Appeals. Without oral argument, the panel, consisting of Circuit Judge Motz, Circuit Judge Shedd and Circuit Judge Gregory, affirmed the grant of summary judgment in an unpublished per curiam opinion. In sum, the panel found no reversible error and affirmed substantially on the reasoning of the district court. Ultimately, after consideration of the petition and since no member of the Circuit Court requested a poll, the same panel denied plaintiff's Petition for Rehearing and Rehearing En Banc.

The facts of the case follow:

On or about March 3, 1999, upon her plea of guilty to Domestic Battery in Case No. 99M-222-H in the Magistrate Court of Ohio County, West Virginia, Plaintiff was sentenced by Ohio County Magistrate Rose M. Humway to one year in the Northern Regional Jail. All but 6 months and one day of that sentence was suspended in lieu of a one year probationary period. The Plaintiff was to serve the six months and one day on 91 consecutive weekends.

After serving two of the weekends, plaintiff requested that due to her medical condition that she be permitted to serve the balance of her sentence on home confinement without electronic monitoring. The sentence was stayed pending the decision on the request. On December 3, 1999, the request was denied by the Honorable Arthur M. Recht, Judge of the Circuit Court of Ohio County, and it was ordered that the sentence be imposed immediately with credit for two weekends already served. *See* a

copy of the Order, App.17a-18a.

The Magistrate was informed concerning the medical condition of the plaintiff on December 15, 1999, and as a result issued a Medication Order on December 21, 1999, that the Northern Regional Jail was to comply with plaintiff's treating physician's orders/requests and provide prescription medicine to Tammy Sabo during the periods of time she was serving at the jail. *See* a copy of the Medication Order App.23A, which provides:

> MEDICATION ORDER
>
> The 15th day of December, 1999, came the State by its counsel, William J. Ihlenfeld, II, Assistant Prosecuting Attorney: as well came the defendant Tammy R. Sabo, in person and by her counsel, Kevin Stryker, Assistant Public Defender, in accordance with the Court's setting the matter for hearing on the terms and conditions of the defendant's serving of the sentence herein.
>
> Whereupon the Court heard the request of the defendant based on the medical treatment rendered by her treating physician, Warren Goodrich, D.O., of Northwood Health Systems, that the Court require the Northern Regional Jail to comply with the treating physician's orders/requests and provide the prescription medicine to Tammy Sabo during the periods of time she is serving her sentence at the Northern Regional Jail.
>
> The Court, being of the opinion the relief requested was proper, and hearing no objection thereto, accordingly
>
> ORDERS the Northern Regional Jail to comply with the medical orders/requests and provide the prescription medicine to Tammy Sabo from her treating physician, Warren Goodrich, D.O.,

of Northwood Health Systems.

SO ORDERED.

ENTER this 21st day of December, 1999.

Rose M. Humway, Magistrate

The medical condition diagnosed by her treating physician Warren P. Goodrich, D.O. included a diagnosis of Panic Disorder with moderate agoraphobia, Social Phobia, Alcohol Abuse and possible Schizotypal Personality Disorder. On or about February 19, 2000, her treating physician issued a letter indicating that because of her depression and agoraphobia she needed to be separated and kept in her own cell away from the rest of the jail community. *See* letter attached at App. 25A, which provides:

> I have been treating Tammy Sabo for many years for depression and agoraphobia. She is now serving time on weekends in the jail. I feel that she needs to be separated, and kept in her own cell away from the rest of the jail community in order to prevent serious complications. She could easily become suicidal as a result of experiencing intense, severe amounts of anxiety due to her placement in the general jail community. Please encourage isolation in order to maintain this patient's current level of mental health. (This opinion has also been put into affidavit form, App.1146a)

Magistrate Humway called the Northern Regional Jail and informed them of the needs set out by Dr. Goodrich. Notwithstanding the Medication Order and letter from the treating physician, the jail refused to isolate her from the general population which included federal prisoners and prisoners who were felons. Additionally, she was not always given her prescription medication at the proper time and sometimes was

given said medication without food although the prescription required them to be taken with food to prevent stomach problems.

This treatment, or lack thereof, continued up until her final release from the jail which took place on or about June 20, 2001. She had nearly ninety (90) separate admissions to the jail.

At the center of this case is the order issued by Magistrate Humway. The Defendants seek to limit the effect of the order by claiming that it deals exclusively with the routine administration of prescription medication, rather than the more serious component of following Dr. Goodrich's direction that Sabo be isolated to minimize the effects of interaction with the general jail population. In light of her chronic and serious mental health history, there was a genuine medical concern that failure to comply with the doctor's recommendation, could trigger her suicidal tendencies. In fact, during the time period an actual suicide attempt was documented as well as other occasions requiring a suicide watch.

This clear order was not followed by the jail, despite actual knowledge by the Warden of the facility, Jamie Spencer. According to Spencer such orders are <u>not</u> routinely followed. App. 756a. Here Spencer admits that following review of the letters with his adviser, the decision was made not to comply with the suggestion made by Dr. Goodrich and to put her in the main line population. Rather, the jail reserves the right to review the medical condition of the inmate by their own medical personnel. If the jail personnel disagree with the recommendation of the inmates' physician or if they disagree with a judicial order, under certain circumstances, the order will not be followed. App. 263a.

In these circumstances the jail follows the procedure of contacting the Judge, often to convince the court to leave the ordered restriction to the jail's discretion. App. 254a-256a. Typically this is done verbally. Under the procedure no attempt is

made to contact the inmate or the inmate's counsel, as the jail personnel seek informally to modify the order. App. 256a. According to Canterbury, the Executive Director of the state-wide jail authority, the informal process is almost always successful. In fact, he can recall only one occasion when a formal court litigation was required to resolve a difference with the Court. App. 254a-255a.

In this case, the jail facility attempted to utilize this informal procedure to escape the effect of a court order. Shar Murrin, who acts as the jail's liaison with the courts, reported that in her conversations with the Magistrate she believed they were relieved from this special housing requirement, a claim reiterated in the Defendants' brief. App. 969a-975a.

However, the Magistrate reported her call with the jail to Sabo's counsel, Public Defender Jack Wood, by means of an official letter communication. That letter provided:

> If you will draft an ORDER relating to the above matter in which you submitted a Motion to Abide with psychiatric opinion of Warren P. Goodrich, D.O., I will certainly review and comply if possible.
>
> I spoke with a representative of the Northern Regional Jail today who told me that they would attempt to comply but that, at certain times they have federal prisoners etc. which may not make it feasible-but to try.
>
> After reading Dr. Goodrich's letter and reviewing warrant and file, I wonder about her mental status at the time of hearing when she was represented by another member of the Public Defenders Office. (3/3.99)
>
> Your kind attention appreciated. (See Wood

affidavit and attachment, p. 8 & 9; App. 1151a-1152a)

Clearly this conversation according to the Judge, did not relieve the jail of following the isolation requirement. It merely acknowledged the tacit conditions that the order be followed as far as practicable. On those occasions when other demands, such as federal prisoners had to be considered, the order need not be followed strictly. Otherwise, the jail was to utilize its best efforts, in good faith, to comply.

Here, the deposition of Spencer and Murrin revealed that there were no practical impediments to compliance. The isolation cells were at all times available for use by Sabo. App. 931a-932a; 953a-954a, App. 722a-723a; 736a.

In fact, Spencer has admitted that the established procedure on determining proper housing where there are special medical concerns, is to have the matters reviewed by his own medical personnel, including the available doctor. Since he is not trained in medical matters, he would rely upon this medical judgment of the licensed physician. App. 753a-754a.

However, on the record, this was not done in this case. Rather, Spencer, on his own authority, chose to disregard the Magistrate's order, Dr. Goodrich's opinion (the treating doctor) and subject Sabo to the unreasonable risk of triggering her suicidal tendencies. App. 755a-757a. While he acknowledges that he should have obtained and followed a physician's medical opinion, there is no such support evidenced here.

Further, according to Sabo, she specifically spoke to and complained to Spencer personally. App.346a-349a. The complaints primarily concerned the absence of the medication she required on a timely basis. According to her testimony, she often

was not provided the medication she required during the afternoon or 2:00 p.m. time slot. In fact, these omissions are somewhat confirmed by the jail's records, as interpreted by their own L.P.N. supervisor. App. 1257a-1265a. Sabo also testified that some of the medication needed to be taken with food, so as to avoid stomach side effects, but this often did not occur resulting in missed medications as well as times she refused the medications due to inability to tolerate the side effects. The hospital records also confirm several refusals. App. 372a-374a.

At the Regional Executive Director level, Canterbury acknowledged that he would at a minimum, expect Spencer to seek to follow the recommendation of a physician. App. 223a. Further, if the informal procedure of adjustment were followed, by means of informal contact with a judge, nonetheless, he would expect that some form of amended order would be forthcoming to document the change. App. 259a. In this case, without explanation or excuse, neither of these critical steps were followed.

The Regional Director acknowledged the endorsement of a policy of not routinely or automatically following court orders, even those entered following a hearing where the states' interests are represented. The Director also acknowledged the existence of a policy of informal attempts to modify court orders, which they disagree with, after the fact, and without notice to the inmate or their counsel. There is no procedure whatever in place to assure that jail officials follow the advice of physicians, rather the usurping of the medical role for themselves, as occurred here. There appears to be no proper training on how to handle a contested court order, including the basic due process requirements of notice and opportunity to be heard by the inmate and/or her counsel.

The actions of the defendants deprived the plaintiff her civil rights including but not limited to the following:

a. Defendants, their agents and employs, with knowledge of plaintiff's medical needs and/or with deliberate indifference to such medical needs, have acted or failed to act in such a way as to deprive plaintiff of necessary and adequate medical care and/or confinement conditions appropriate to her medical condition, thereby endangering the plaintiff's health and well-being. Such acts and omissions of the defendants violate rights secured to the plaintiff under the Eighth and Fourteenth Amendments.

b. Defendants, knowing of the medical needs of the plaintiff and with deliberate indifference to the inadequacies and deficiencies in the medical and other staffing and procedures at the Northern Regional Jail, have failed and neglected to establish and implement policies, practices and procedures designed to assure that plaintiff receive medical treatment and care and/or confinement conditions appropriate to her medical condition at the standards thereof in the west Virginia regional Jail & Correctional Authority, or have adopted policies, practices and procedures which defendants knew, or reasonably should have known, would be ineffective in delivering medical treatment and care at such standards, thereby endangering the plaintiff's health and well-being in violation of rights secured by the Eighth and Fourteenth Amendments.

c. Defendants, knowing of the medical needs of the plaintiff and with deliberate indifference to such needs, have failed to instruct, supervise or train their employees and agents in such a manner as to assure the delivery of adequate medical care to plaintiff and/or confinement conditions consistent with her medical condition, thereby endangering the plaintiff's health and well-being in violation of the Eighth and Fourteenth Amendments.

These actions allegedly have served to deprive the Plaintiff of her civil rights, as previously outlined, under color of law and hence violate the United States Constitution and are actionable under 42 U.S.C. §1983.

REASONS FOR GRANTING THE WRIT

I. This Court should grant certiorari to decide whether a grant of summary judgment was proper regarding plaintiff's Eighth Amendment claim of cruel and unusual punishment when several genuine issues of material fact remain as to whether, objectively, plaintiff had demonstrated a substantial risk of sufficiently serious harm from the alleged deprivations of appropriate medication and confinement conditions as per her diagnosed medical condition. Moreover, whether a grant of summary judgment was proper when several genuine issues of material fact remain as to whether, subjectively, defendants had acted with sufficiently culpable states of mind.

This case is a demonstration whereby a legitimate conservative judicial philosophy, permeates neutral legal procedure to the point where an unpopular litigant effectively is deprived of the benefit of basic legal rights. Counsel has practiced civil rights law, primarily from the perspective of plaintiffs for nearly thirty years, mainly under the jurisdiction of the Third Circuit Court of Appeals, as his office is based in Western Pennsylvania. However, he has recently been requested to take cases in nearby West Virginia, within the jurisdiction of the Fourth Circuit. This petition for writ of certiorari is part of a series of filings and anticipated filings seeking to bring to the attention of the Court, the perspective

that the conservative judicial philosophy of the Fourth circuit has evolved such that parties challenging law enforcement rarely receive the benefit of basic legal precepts. An earlier petition, Edens v. Kennedy, No. 04-895, sought to demonstrate that the doctrine of qualified immunity was so strictly applied in the Fourth Circuit that cases where rights were recognized as violated were not published, so as to allow continual immunity for the same actions by law enforcement. The instant petition, a prisoner's medical treatment case, is offered to demonstrate a plaintiff's inability to survive summary judgment when facts are assumed favorable to the defendant law enforcement officials, without the opportunity for a fair factual hearing.

This Court has held that under the Eighth Amendment's proscription on cruel and unusual punishment, prisoners have the constitutional right to medical care. Estelle v. Gamble, 429 U.S. 97, 50 L.Ed. 2d. 251, 97 S.Ct. 285(1976). The Court explained that a prisoner's Eighth Amendment right is violated when officials are deliberately indifferent to the prisoner's serious medical needs. Id. at 104.

Several circuits have held that a prisoner has a clearly established constitutional right to be protected from known risks of suicide and to have his serious medical needs attended to. Yellow Horse v. Pennington Cty, 225 F.3d. 923, (8th Cir. 2000). Also a prison inmate has an Eighth Amendment right to be free from deliberate indifference to serious psychiatric needs. Waldrop v. Evans, 871 F.2d 1030 (11th Cir. 1989).

A prisoner's psychological needs clearly may constitute a serious medical need, especially when it results in suicidal tendencies. Horn v. Madison Cty, Fiscal Ct. 22 F.3d 653 (6th Cir, 1994). Where plaintiff alleges that defendants are indifferent to the prisoners' psychological needs, particularly suicidal tendencies, the objective component of the constitutional claim is easily satisfied.

Comstock v. McCrary et. al, 273 F.3d, 693 (6th Cir. 2001).

It is noted that Fourth Circuit rulings are consistent with the law from the circuits. In Lee v. Dunn, 641 F.2d 1117, 1121 (4th Cir, 1981) it was explained that "prison officials have a duty to protect prisoners from self-destruction or self-injury," cited with approval in De' Lonta v. Angelone, 330 F.3d 630 (4th Cir, 2003). De' Lonta also held that an inmate's need for self-protection was a serious medical need to which prison officials could not be deliberately indifferent. The district court's opinion, as adopted by the Fourth Circuit, further delineated the appropriate Eighth Amendment test to be employed in the instant case, noting that in order to establish such a violation, the plaintiff must prove "(1) that the deprivation of [a] basic human need was objectively sufficiently serious, and (2) that subjectively the officials act[ed] with a sufficiently culpable state of mind." (*See* Memorandum Opinion, App. 12A, quoting De'Lonta v. Angelone, 330 F.3d 630,634 (4th Cir. 2003)(citing Wilson v. Seiter, 501 U.S. 294, 297 (1991)).

It is important to note, however, that the district court, as well as the Fourth Circuit panel, appear to have overlooked an important part of the opinion in De'Lonta, supra, which further explains how a plaintiff can satisfy the first prong of the aforementioned test. In particular, the Fourth Circuit Court set forth two ways in which a plaintiff can demonstrate an extreme deprivation adequate to satisfy the objective component of the test. In sum, a plaintiff can either allege "a serious or significant physical or emotional injury resulting from the challenged conditions, or demonstrate a substantial risk of such serious harm resulting from the prisoner's exposure to the challenged conditions." De'Lonta, 330 F.3d at 634 (citing Helling v. McKinney, 509 U.S. 25, 31 (1993)).

Instead of exploring the "substantial risk" factor, a crucial element of the plaintiff's case, especially at this early stage of the

proceedings prior to trial, the lower court focused its analysis, narrowly, on causation finding that, despite the fact that the plaintiff had presented facts indicating a serious mental injury, she had shown neither cause in fact nor proximate cause in relation to the alleged deprivations at the Jail. App. 13A. The lower court's only apparent explanation for the exclusion of the substantial risk element and the narrow focus on causation seems to come from the distinction between the differing standards of review found in De'Lonta and the instant case, i.e. motion to dismiss versus motion for summary judgment. App. 12A-13A

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Notwithstanding the differing standards of review, Plaintiff argues that several genuine issues of material fact remain with regard to whether or not the defendants' failure to follow a doctor's segregation recommendation incorporated into a Magistrate's Order, along with the failure to regularly provide prescription medication, enhanced substantial suicidal risks and amounted to objectively sufficiently serious deprivations.

In sum, Sabo has maintained that the alleged deprivations of medical care and improper-confinement conditions, i.e. failure to ensure proper medication and failure to isolate from the general population, on behalf of defendants, were "sufficiently serious" because she suffered from depression and agoraphobia. Further, Sabo has argued that the defendants had sufficiently culpable states of mind because they knew of her condition through her treating physician's requests and recommendations, as incorporated by the Magistrate's Order. And, that defendants knew that failure to follow such recommendations would result in a deterioration of mental health and enhance suicidal risks. Overall, Sabo has contended that she has a constitutional right to be protected from known risks of suicide and to be free from deliberate indifference to serious psychiatric needs. App. 11A .

In support of her argument, Sabo attested to complaining to

Defendant Spencer about routinely not receiving her medications in the afternoons and/or being unable to take them without proper food or water. (App., Vol. II, pp. 346a-349a, 372a-374a). In fact, these omissions were somewhat confirmed by the Jail's records, as interpreted by their own L.P.N. supervisor. (App., Vol. III, pp.1257a-1265a). Furthermore, Sabo attested to being placed in the general population, in a cell by herself, despite the fact that she was deemed suicidal upon admission. (App., Vol. II, p.338a). Defendant Spencer admitted that despite recommendations from Sabo's treating psychiatrist that she be placed in isolation, the decision was made to place her in the main line population. (App., Vol. II, p. 756a).

Sabo testified to the actual effects of her illness while incarcerated, which included severe emotional distress and related physical trauma consisting of headaches, upset stomach, nightmares, nervousness, shortness of breath due to panic attacks, involuntary jumping at the slightest provocation, and the constant tightening of muscles in the neck and chest producing pain and discomfort. (App., Vol. II, pp. 356a, 367a, 372a). Moreover, Sabo directed the lower court's attention to the affidavit and testimony of her treating psychiatrist, Dr. Goodrich, who described her serious mental health history and specifically stated that the risk of suicide was realistic under the circumstances of this case. (App. Vol. III, pp. 1368a, 1375-76a, 1389-90a, 1393a). Importantly, Dr. Goodrich's testimony supported the fact that his recommendations were necessary for the benefit of Sabo's mental health, and his earlier diagnoses, that the failure to recognize her need for isolation and proper medication would result in serious complications of her depression and agoraphobia, remain unrebutted.

With respect to the issue of whether the Magistrate's Order and subsequent doctor recommendations were followed, Sabo cited the relevant testimony of Defendants Spencer and Canterbury which indicated certain policies of the Jail in regard to court orders

and physician recommendations. In particular, Defendant Spencer's testimony reflected a policy of the Jail to informally and without documentation, decide whether or not to consider the information contained in a letter from a personal physician. (App., Vol. II, pp. 752-54a). Interestingly, Spencer admitted that what he considered to be suggestions were not routinely followed but rather reviewed within the discretion of jail personnel. Id.

Similarly, Defendant Canterbury indicated that under certain circumstances a judicial order, particularly medical orders, may not be routinely followed until after a review by medical staff and/or informal communication with the magistrate, notably without the presence of counsel. (App., Vol. I, pp. 255-56a, 263a).

The district court conceded that Sabo had successfully presented facts indicating a serious mental injury, but held that she did not make the requisite showing that her injuries were caused by deprivations at the Northern Regional Jail or that the deprivations themselves were severe. Notwithstanding the aforementioned citations to the record, the district court found that Sabo had not demonstrated a causal link between her time in the Jail and her injury. App. 15A. In particular, the court reasoned that the evidence proffered only showed that Sabo had severe preexisting mental issues going into the Jail, any suicide attempts occurred outside of the intermittent incarcerations, and focused on the fact that Sabo herself was unsure if the suicide attempts were caused by conditions in the Jail. App.13A-15A.

Moreover, the district court opined that Sabo had not shown that the alleged deprivations were severe for purposes of the Eighth Amendment. Specifically, the court found that defendants' decisions to keep Sabo in the general population were made in her best interest, Sabo had failed to show how the lack of food with medication constituted a severe deprivation, and cited Sabo's lack of a formal grievance, regarding the same, as evidence that she was

not suffering from the severe deprivation alleged. App.15A-17A. Notably, the court stated that the evidence of record demonstrated that Sabo had received her medications while incarcerated. Id.

Ultimately, the district court also held that Sabo had failed to show deliberate indifference to her serious medical needs on behalf of the defendants. App. 17A. In sum, the court found that based on the content of the doctor's letters and the Court Order in question, along with the actions by defendants of placing Sabo on suicide watches, placing Sabo in the general population to avoid the stresses of the isolation conditions at the Jail, and records of Sabo receiving her medications, it was clear that defendants had taken measures to ensure compliance with "the spirit" of Dr. Goodrich's recommendations and had thus complied with the Medication Order. App.17A-19A.

Petitioner Sabo respectfully submits that her aforementioned citations to the record are relevant and support her proposition that several genuine issues of material fact remain in this case, especially when viewed in a light most favorable to her position. In particular, Sabo contends that Dr. Goodrich's testimony supports her position that the risk of suicide under the alleged circumstances was a realistic threat. Since the risk is the legal element to be established , and the Doctor did not speculate about the risk, the fact that she did not in fact commit suicide is of no legal concern. *See* De Lonta v. Angelone, 330 F.3d 630 (4th Cir. 2003); Comstock v. McCrary, 273 F.3d 693 (6th Cir. 2001). Accordingly, Sabo argues that the objective component of her constitutional claim has been met.

It is equally clear that the subjective element whereby a defendant draws the inference that the prisoner is exposed to a specific danger, also was easily established in this case. As noted above, a specific doctor's recommendation, as incorporated by a specific court order, was issued to the defendants and, as Sabo

argues, was not followed. Based on the testimony of Defendants Canterbury and Spencer, this appears to be part of an established pattern and practice and policy whereby such medication orders and recommendations are resisted unless confirmed by the prison doctor and/or otherwise modified by means of ex parte contacts with judges. It is respectfully submitted that disregarding a court order of which the jail personnel have personal knowledge is sufficiently serious and deliberately indifferent, regardless of what the district court deems to be reasonable attempts to comply with "the spirit" of the doctor's recommendations. At the very least, Sabo maintains that the record demonstrates that at times she was not isolated and did not routinely receive her medications and, as such, creates genuine issues of material fact proper for consideration by a jury.

Respectfully, it is submitted that Sabo, and other prisoners similarly situated are entitled to better care than this. The jail should be directed to unhesitatingly comply with judicial orders. Since these orders are entered after a full hearing with state participation, if there are to be any modifications, it should be done after a full hearing with notice to the parties and counsel. This Court is urged to write a forceful opinion to jail authorities, directing them to alter the policies and practices that put Sabo and other prisoners at risk. Moreover, since it is anticipated that these problems within the jail system will continue, it is respectfully requested that this Court grant the Petition in an effort to clarify the district court's ruling with respect to the proper test to be applied to Eighth Amendment, cruel and unusual punishment cases.

II. This Court should grant certiorari to decide whether the proper standard for summary judgment was applied to the instant case. In particular, the Court is respectfully requested to determine whether the plaintiff was afforded the benefit of all proper inferences with

respect to her position that the Doctor's recommendations were incorporated into the Magistrate's Order and were otherwise ignored.

As recognized by this Court in Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 587 (1986), when reviewing the supported underlying facts pursuant to Federal Rule of Civil Procedure 56(c), a motion for summary judgment, all inferences must be viewed in a light most favorable to the party opposing the motion. See id. (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)). The plaintiff argues that based upon the record and the opinion of the district court below, as adopted by the Circuit Court, it is apparent that she was not afforded the benefit of all factual inferences in a light most favorable to her Eighth Amendment claim.

The district court only twice addresses plaintiff's contention that Dr. Goodrich's letters, recommending both isolation and proper medication, were clearly incorporated into Magistrate Humway's Order and were ultimately ignored.

First, in the context of a deliberate indifference analysis, the district court disagreed with plaintiff's contention that the subjective element of the Eighth Amendment test was satisfied because the defendants had ignored a court order, as well as her doctor's recommendations thereby incorporated. In sum, the court found that based upon the content of the letters and the order itself there was no indication that they were ignored. App. 18A.

Overall, as previously discussed, the district court found that the Northern Regional Jail had monitored Sabo's psychological health, took steps to ensure the plaintiff would not suffer any severe deprivations, and responded reasonably to the risks presented in the doctor's evaluation. Therefore, the court held that the plaintiff had not established that the subjective acts of the defendants violated

her Eighth Amendment right against cruel and unusual punishment. App. 19A.

The district court addressed plaintiff's argument a second time in the context of a qualified immunity analysis. There, the court held that plaintiff erroneously relied on the assumption that Dr. Goodrich's letters and Magistrate Humway's order required Sabo's placement in isolation. App. 20A. Instead, the court held that the plain language of these documents merely asks the jail officials to "consider" isolation and/or merely "encourages" isolation. Similarly, the court opined that the Magistrate Order simply directs the jail to provide Sabo with medication, but does not require isolation. Overall, the court felt that the letters ultimately requested action for the sake of Sabo's mental health and that such action had been taken. App. 20A.

Plaintiff maintains that a plain reading of the documents in question leads to the conclusion that the Magistrate's Order was a legal direction to the Jail, requiring them to follow her doctor's orders/requests. Clearly the doctor's letter constitutes a request that Sabo be segregated to avoid the substantial risk of suicide. Read in conjunction with each other, the mandatory effect to segregate is clear. And it is respectfully submitted that at the summary judgment level, the district court's interpretation of the documents in question is not supported by the proper standard which should afford the plaintiff the benefit of all factual inferences. Ultimately, plaintiff maintains that this question of interpretation remains a genuine issue of material fact proper for consideration by a jury.

Furthermore, it is important for the Court to recognize that while the district court makes short shrift of plaintiff's argument for the proper interpretation of the documents in question, it does take the time to explain how the defendants in this case reasonably attempted to comply with the "spirit" of the Magistrate's Order and/or physician letters and as such, no sufficiently serious

deprivations resulted. While it is not clear what precedent the district court refers to for this standard with regard to Eighth Amendment, cruel and unusual punishment claims, regardless, the plaintiff argues that throughout its analysis the district court once again fails to afford her the benefit of all the factual inferences.

For instance, with regard to the substantial risk factor of the objective test for "sufficiently serious deprivations," the district court held that in light of Sabo's mental and physical health, and the exigencies of time and circumstance, the routine admission evaluations, the suicide watch, regular distribution of medications, and the lack of grievance on the part of Sabo all indicated that defendants maintained reasonable conditions. App. 20A-21A. Despite the finding that she was provided with appropriate medical care and confinement conditions, plaintiff submits that as per her testimony several genuine issues of material fact remain.

Beginning with Sabo's treatment upon her intermittent admissions to the Jail, the district court emphasizes the efficacy of the physical and psychiatric evaluations performed by the staff nurses and the booking officers. Accordingly, they deem the routine inquiries regarding suicidal tendencies and current medications, which occasionally led to suicide watches being ordered, strong evidence of appropriate medical care as provided by the defendants. App. 18A-19A. However, this is only half of the story. Without explanation, certain parts of Sabo's deposition testimony are overlooked.

For instance, while it may be true that on every separate admission the plaintiff was routinely asked if she was suicidal, it is not clear that the subsequent decisions made by the staff, which included nurses and/or guards, but not a doctor, were always in her best interest. Sabo attests to several occasions where by simply answering "yes" to questions of suicidal thoughts she was placed on a suicide watch in a holding cell. (App., Vol. II, p. 337a).

However, Sabo also recalls certain times when, although deemed suicidal, she would be placed back into the general population in a cell by herself during which a guard, not a nurse or doctor, would check on her every hour or so. (App., Vol. II, p.338a). As such, and contrary to the opposing arguments, it is not clear from the record how these perfunctory inquiries and subsequent housing decisions actually addressed and/or accommodated Sabo's well-known serious medical needs.

Interestingly, when Sabo would admit to suicidal ideations the defendants felt it necessary to follow Dr. Goodrich's suggestions and isolate her, to varying degrees, yet on other occasions would simply disregard the recommendations and mainstream her. In either scenario it is not clear that her serious medical needs were addressed. While the periodic checks by jail personnel may have averted an actual suicide attempt during specific time periods in the Jail itself, the overall disregard for the isolation recommendations and placement in the general population even during certain suicide watches certainly can be seen to have enhanced the risk of serious harm and/or significantly contributed to Sabo's alleged injuries.

Furthermore, the district court focuses on Dr. Goodrich's testimony regarding the isolation conditions at the Jail. App. 16A. Having never actually visited the Jail, the Doctor basically responded hypothetically to descriptions of the holding cell versus the general population cells. (App., Vol. III, 1348a-1349a). When presented with the two alternatives Dr. Goodrich simply picked the apparent lesser of two evils with respect to Sabo's mental conditions. However, such a hypothetical answer does not negate the basis of his recommendations for isolation, nor does it automatically translate into evidence of record demonstrating that the defendants' housed Sabo according to her best interest. Interestingly, nothing in the record explains why the holding cell could not be altered with a curtain or otherwise, in an attempt to

address all of Sabo's serious psychiatric needs.

Additionally, the district court maintains that despite Sabo's contentions, the medication charting records demonstrate that she was regularly given her medication during incarceration. App. 16A-17A. However, Sabo specifically recalls not receiving her afternoon medication regularly, not being given adequate food and water with certain medications, as well as not being able to effectively swallow any of the medications crushed and/or mixed together in powder form. (App., Vol. II pp. 343a- 350a).

Contrary to the opposing conclusions, a review of the medication charting records does support Sabo's claims. Although Sabo specifically recalls the irregular dispensing of her Visteril in the afternoons, the records actually reveal some discrepancies regarding the 2:00 pm delivery of Neurontin. It is noteworthy that on several occasions the charting indicates that either no delivery was made, i.e. appropriate box left blank with no entry of nurse initials, no nurse was available, i.e. appropriate box marked with an "X," or delivery was made but Sabo refused the medication, i.e. appropriate box marked with nurse's initials and then circled. (App., Vol. II pp. 869a,872a,874a,875a). No matter how you interpret the charting it is clear that on certain specific days Sabo did not effectively receive at least one of her afternoon medications. And whether or not the medications did not make it to her cell or she refused them because she was unable to swallow them in crushed form (she often regurgitated them, App. Vol. II, p. 353a), it is clear that jail personnel were well aware that Sabo was not being fully medicated as prescribed. (*See also* App., Vol. III, pp. 1257a-1265a, L.P.N. supervisor admits that the charting could be interpreted to reflect that Sabo did not receive her medications regularly).

Turning to the issue of the grievance procedure available at the Jail, while the district court concedes that failure to file a formal

grievance is not dispositive of Sabo's claim, they rely on it as evidence that she was not suffering any "severe deprivation." App. 16A-17A. In drawing such a conclusion they once again have overlooked several integral parts of Sabo's deposition testimony. First, it is important to acknowledge Sabo's state of mind during her intermittent periods of incarceration. When asked why she did not file a grievance after being placed in the general population while under a special suicide watch, Sabo reasoned that she was not at the Jail long enough to see it through. (App., Vol. II, p. 339a).

Based on Sabo's observations she believed that because she was only there two days a week it was not enough time to fully exercise the grievance procedure. Sabo specifically recalled hearing other inmates complain about waiting weeks for a response so she concluded that there was no sense in even getting started. (App., Vol. II, p. 339a). Further influencing her state of mind was the attitude of the guards whom she recalls often tormented her about her placement for the weekend. (App., Vol. II, pp. 354a, 355a). Sabo specifically remembered an incident where she reminded the guards about Dr. Goodrich's February 29th letter, recommending that she be kept alone, as she was being placed in the general population. (App., Vol. II, p.364a). Despite her pleas for isolation, the guards responded to Sabo by placing her in the A-5 pod with a roommate anyway, adamantly reminding her that her doctor does not run the Jail. Id. Ultimately, plaintiff argues that the words of the guards evidence the clear policy and/or custom of the defendants in disregarding doctors' recommendations even if incorporated by a magistrate's order.

In further rebuttal of the failure to file a formal grievance, plaintiff directs the Court's attention to two other important parts of her deposition seemingly overlooked by the district court. Plaintiff recalls two specific instances were she informally complained to Jail personnel and/or prison officials to no avail. First, Plaintiff attested to informing a counselor named "Char" about not receiving her afternoon medications regularly which would cause frequent

headaches and anxiety. (App., Vol. II, p. 356a, 357a). Although Sabo would use the buzzer to summon the guard and request medication, often the nurse would not show. (App., Vol. II, p. 344a). Once, after running into "Char" in the pod area, Sabo inquired about the medication problem and was told that it would be looked into, ultimately making sure that she got them. See id. at 343a. Unfortunately for Sabo, this so-called informal grievance procedure produced no results. See id. at 345a.

Similarly, Sabo recalls having the opportunity to complain to Defendant Spencer about the same issue, face to face. Though denied by Spencer, Sabo attested to meeting with him in the booking area after she had been "raising cane" with the guards about not getting her medications. (App., Vol. II, p. 347a). According to Sabo, she was upset with the guards reaction to her medication complaints who purportedly said things like "you'll get it when we get around to it" and "you'll get it when you get it." Id. In the end Sabo recalls Defendant Spencer coming to the booking area and talking with her personally and promising that he would see what he could do about the issue. See id. at 348a. Once again Sabo's informal grievance procedure failed to achieve any results, thus leading her to reasonably believe that any further action on her part would be futile. See id. at 349a.

With respect to Sabo's recorded suicide attempts in January and September of 2000, the lower court places great weight on the testimony of Sabo and Dr. Goodrich. In particular, they focus on so-called admissions by Sabo that she is unsure if any of the suicide attempts were caused by conditions in the Jail. App. 14A-15A.

Beginning with the lower court's rationale, it is noteworthy that they further anchor their opinion that a causal link does not exist upon boilerplate forms filled out pursuant to Sabo's September 2000 suicide attempt which state that she was upset about her boyfriend, as well as statements by Dr. Goodrich

indicating that going to jail in general might have triggered the episodes. App. 14A-15A. Plaintiff submits that neither of these evidentiary entries are damaging to her case, especially with the benefit of all factual inferences viewed in a light most favorable to her.

First and perhaps foremost, it is important to remember that Sabo is not a doctor and therefore cannot properly assess all of the factors that contributed to either of the aforementioned attempts. As such, anything she stated while in such a fragile state certainly should not be afforded the same evidentiary weight as an official diagnosis or expert testimony. Second, with respect to Sabo's deposition testimony, the portion cited to by the lower court actually cuts against their rationale. App.15A. Specifically, when asked if she remembered why she had tried to kill herself in September of 2000 she replied "[j]ust upset and worrying about going to jail." The lower court finds it important to emphasize the phrase "going to" in Sabo's response and presumably they interpret it as a reference to the fear of going to jail in general. However, unlike the first suicide attempt which occurred prior to the start of the full 91 weekend intermittent sentence, here Sabo is speaking to the second attempt which occurred several months into the incarceration. Accordingly, her statement very well could be interpreted as evidence of her fear of going back to jail to face the stressful conditions, a hurdle she had to overcome on a weekly basis.

With respect to Dr. Goodrich's deposition testimony, the lower court zeros in on his statement that the stressor of going to jail might have led to Sabo's suicide attempt. They dismiss this professional opinion as speculative and too general to serve as evidence of Sabo's injuries. App. 13A-14A. While it may be true that Dr. Goodrich has no specific recollection and/or documentation regarding the specific causes of the suicide attempts, noting that he was not the treating physician as of the

second recorded attempt, his testimony does outline the serious risk of harm Sabo faced without isolation and proper medication. Under the law, it is the risk that is the material element of the civil rights violation, rather than the actual injury.

For instance, Goodrich explained that Sabo was diagnosed with a GAF score of 43 indicating a significant level of impairment of daily functioning including a genuine potential risk of suicide. (App., Vol. III, pp. 1375a, 1376a). And he goes on to describe Sabo's " psychopathology" and "fragile personality makeup," explaining that she is a person who cannot deal with much stress and that stress to her might be nothing to the average person. See id. at 1382a, 1386a. Such stress, according to Goodrich, often generates panic attacks which could lead to self-destructive behavior. See id. at 1387a. That this in fact occurred is confirmed by both the defendants and the district court who noted that on several occasions the plaintiff was placed on a suicide watch. App. 18A. It is troubling how the district court utilizes this manifestation of the predicted harms, confirmed by defendants own personnel, to somehow benefit them a summary judgment.

Moreover, Goodrich discusses the importance of Sabo regularly getting her medications in order to avoid decompensation and high levels of emotional stress. See id. at 1390a. And he affirms that the risk of suicide was a realistic threat from being placed in the general population. See id. at 1393a. It is clear that these were Goodrich's specific concerns when he wrote the letters to the Jail requesting isolation and proper medication. See id. at 1389a,1390a.

Overall, plaintiff submits that both her testimony and Dr. Goodrich's demonstrate the serious risk of harm that she was subjected to at the Jail by not being isolated and/or regularly provided medications. At the very least, a careful review of the record in a light most favorable to Sabo reveals several genuine

issues of material fact which should have survived the motion for summary judgment. The legal standard as defined in De'Lonta, supra, only requires that the plaintiff demonstrate a substantial risk of serious harm resulting from the prisoner's exposure to the challenged conditions, of which it cannot be said as a matter of law the plaintiff has not satisfied.

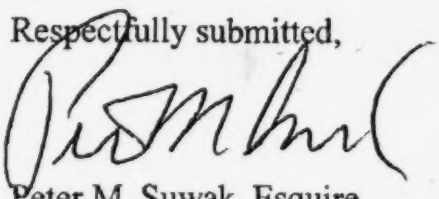
This Court is urged to grant certiorari. If courts fail fairly to shine the light of inquiry upon the actions of prison officials, the natural political tendency to reduce or ignore the legitimate medical concerns of prisoners will be without a legal countervailing balance. Further, the evaluative tendencies of the most conservative circuit, affecting the manner in which facts are viewed in the course of summary judgment motions, has seriously skewed the procedure in favor of defendant law enforcement officials. This tendency grossly handicaps the ability of civil rights plaintiffs, always facing uphill fights, to pursue their causes.

It is feared that absent intervention by this Court, that this legal imbalance will remain uncorrected and that an unhealthy and prejudicial sense of near absolute immunity in the law enforcement community will encourage rather than dissuade the human tendency to abuse power against the nearly helpless.

CONCLUSION

Petitioners respectfully request that this Court grant the Petition.

Respectfully submitted,



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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
April 28, 2006

No. 05-1805
CA-03-84

TAMMY R. SABO

Plaintiff - Appellant

v.

STEVE CANTERBURY, Individually and in his capacity as Director, West Virginia Regional Jail and Correctional Facility Authority; JAMIE SPENCER, Individually and in his capacity as Warden; NORTHERN REGIONAL JAIL AND CORRECTIONAL FACILITY; WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY

Defendants- Appellees

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and

rehearing en banc is denied.

Entered for a panel composed of Judge Motz, Judge Shedd, and Judge Gregory.

For the Court,

/s/ Patricia S. Connor

CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-1805

TAMMY R. SABO,

Plaintiff - Appellant,

v.

STEVE CANTERBURY, Individually and in his capacity as Director, West Virginia Regional Jail and Correctional Facility Authority; JAMIE SPENCER, Individually and in his capacity as Warden; NORTHERN REGIONAL JAIL AND CORRECTIONAL FACILITY; WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY,

Defendants- Appellees.

Appeal from the United States District Court for the Northern District of West Virginia, at Wheeling. Frederick P. Stamp, Jr., District Judge. (CA-03-84)

Submitted: March 24, 2006 Decided: March 30, 2006

Before MOTZ, GREGORY, and SHEDD, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Peter M. Suwak, Washington, Pennsylvania for Appellant. David L. Wyant, BAILEY & WYANT, P.L.L.C., Wheeling, West Virginia; Chad M. Cardinal, WV REGIONAL JAIL & CORRECTIONAL FACILITY AUTHORITY, Charleston, West Virginia, for Appellees.

PER CURIAM:

Tammy R. Sabo appeals the district court's order granting summary judgment to the defendants on her claim of deliberate indifference to her medical needs under 42 U.S.C. § 1983 and on her state law claims. We have reviewed the record and find no reversible error. Accordingly, we affirm substantially on the reasoning of the district court. See Sabo v. Canterbury, No. 5:03CV84 (N.D. W. Va. June 16, 2005). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

TAMMY SABO,

Plaintiff,

v. Civil Action No. 5:03CV84 (STAMP)

STEVEN CANTERBURY, individually and in his capacity as Director, WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILLITY AUTHORITY, and JAMIE SPENCER, individually and in his capacity as Warden, NORTHERN REGIONAL JAIL AND CORRECTIONAL FACILITY,

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Plaintiff, Tammy Sabo, filed a complaint with this court on June 20, 2003. Plaintiff's claim alleges the defendants were indifferent to plaintiff's medical needs in violation of 42 U.S.C. § 1983. The plaintiff also makes state law claims for intentional infliction of mental distress, negligence and failure to provide adequate medical care and/or confinement conditions. On August 9, 2004, this Court entered a memorandum opinion and order granting in part and denying in part defendants' motion to dismiss the above-styled civil action.

In its August 9, 2004 opinion, this Court held that the plaintiff's claims for monetary damages against the

defendants in their official capacity, and against the Northern Regional Jail and Correctional Facility ("Northern Regional Jail"), were barred by the Eleventh Amendment. See Op. at 4-5. However, this Court denied the defendant's qualified immunity argument pursuant to Federal Rule of Civil Procedure 12(b)(6), accepting as true all well-pleaded material factual allegations. This Court found that the plaintiff's complaint stated a possible Eighth Amendment claim for ineffective medical treatment upon which relief could be granted, but denied the plaintiff's Fifth and Ninth Amendment claim.[1] Finally, this Court gave the plaintiff leave to amend her complaint to allege physical manifestations of emotional distress.

Pursuant to the August 9, 2004 opinion, the plaintiff filed an amended complaint and the defendants, Steven Canterbury ("Canterbury"), Jamie Spencer and Northern Regional Jail, filed a third-party complaint against Primecare Medical of West Virginia ("Primecare").[2] Defendants then filed a motion for summary judgment, plaintiff filed a response and defendants filed a reply. Following the deposition of the plaintiff's treating psychologist, Warren P. Goodrich, D.O., ("Dr. Goodrich"), defendants filed a supplemental memorandum in support of their motion for summary judgment, and the plaintiff replied.

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[1] This court also held that the exhaustion requirement of 42 U.S.C. § 1997e(a) did not apply to the plaintiff because she filed her complaint after she was released from the Northern Regional Jail. Further, this Court found the restrictions of § 1997e(e) were inapplicable for similar reasons, and also because the plaintiff could amend her complaint to allege physical manifestations of emotional distress. See Op. at 13-16.

[2] Primecare was thereafter dismissed pursuant to Federal Rule of Civil Procedure 41(a).

II. Facts

The facts of this case have been stated in this Court's August 9, 2004 opinion addressing defendants' motion to dismiss, and need not be repeated in detail here.

To summarize, the plaintiff served sentence of six months and one day over 91 consecutive "weekends."[3] See Mot. Summ. J., Ex. A. Upon arrival at the Northern Regional Jail, the plaintiff was given a handbook outlining the grievance procedure and she was instructed on how to file a grievance. See Mot. Summ. J., Ex. D. On June 20, 2001, plaintiff finished her sentence at the Northern Regional Jail and was released. Two years later, the plaintiff filed this action alleging that, while incarcerated, defendants refused to isolate her from the general inmate population and did not give plaintiff her prescription medication at the proper time or in the proper manner.

III. Applicable Law

Under Federal Rule of Civil Procedure 56(c), summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The party seeking summary judgment bears the initial burden of

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[3] Plaintiff began serving her sentence on the weekends, but beginning around May 17, 2000, the plaintiff served her two-days per week on Wednesdays through Fridays to ensure the availability of a mental health provider while plaintiff was in the Northern Regional Jail. See Mot. Summ. J. at 3.

showing the absence of any genuine issues of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). "The burden then shifts to the nonmoving party to come forward with facts sufficient to create a triable issue of fact." Temkin v. Frederick County Comm'rs, 945 F.2d 716, 718 (4th Cir. 1991), cert. denied, 502 U.S. 1095 (1992) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986)).

However, as the United States Supreme Court noted in Anderson, "Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." Id. at 256. "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id. at 250; see also Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979) (Summary judgment "should be granted only in those cases where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law." (citing Stevens v. Howard D. Johnson Co., 181 F.2d 390, 394 (4th Cir. 1950))).

In Celotex, the Court stated that "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Summary judgment is not appropriate until after the non-moving party has had sufficient opportunity for discovery. See Oksanen v. Page

Mem'l Hosp., 912 F.2d 73, 78 (4th Cir. 1990), cert. denied, 502 U.S. 1074 (1992). In reviewing the supported underlying facts, all inferences must be viewed in the light most favorable to the party opposing the motion. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

IV. Discussion

A. Section 1983 Claim

The defendants argue that the plaintiff has failed to establish the elements necessary to prove a violation of her Eighth Amendment rights, and therefore, her claims pursuant to § 1983 must be dismissed. Specifically, the defendants argue that the plaintiff has not shown that the alleged deprivation of medical care and improper confinement conditions were "sufficiently serious" as required to survive summary judgment. Even if the alleged violations were sufficiently serious, the defendants argue that they lacked sufficiently culpable states of mind for purposes of § 1983.

The plaintiff responds that deprivation of medical care and improper confinements conditions were "sufficiently serious" because the plaintiff suffered from depression and agoraphobia. Further plaintiff argues that defendants had sufficiently culpable states of mind because the defendants knew of the plaintiff's condition through her treating physician's recommendations. Plaintiff contends that the defendants knew that failure to follow such recommendations of plaintiff's treating physician would result in a deterioration of mental health and suicidal tendencies.

As stated by this Court's August 9, 2004 opinion, the plaintiff's § 1983 claim relies on her ability to show defendants violated her Eighth Amendment right against

cruel and unusual punishment. See Young v. City of Mount Ranier, 238 F.3d 567, 574 (4th Cir. 2001). In order to establish a violation of the Eighth Amendment, the plaintiff must prove "(1) that the deprivation of [a] basic human need was objectively sufficiently serious, and (2) that subjectively the officials act[ed] with a sufficiently culpable state of mind." De'Lonta v. Angelone, 330 F.3d 630, 634 (4th Cir. 2003) (emphasis in original) (internal quotation marks omitted) (citing Wilson v. Seiter, 501 U.S. 294, 297 (1991)).

1. Plaintiff's Deprivation Not Objectively Sufficiently Serious

In considering the first prong, the phrase "sufficiently serious" means "extreme deprivations," and a claimant must show a "serious or significant physical or emotional injury resulting from the challenged conditions." De'Lonta at 634. In De'Lonta, the Fourth Circuit considered a prisoner's need for protection against self-mutilation to be a serious medical need sufficient to satisfy the first prong of the Eighth Amendment inquiry. However, it should be noted that the De'Lonta court was reviewing a district court's dismissal of proceedings in forma pauperis pursuant to § 1915(e)(2)(B)(ii).[4]

In contrast, this Court in this case considers the first prong for purposes of summary judgment, which creates a

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[4] To dismiss for failure to state a claim in proceedings in forma pauperis, a court must accept all well-pleaded allegations in the plaintiff's as true and it must appear certain that the plaintiff cannot prove any set of facts in support of his claim entitling the plaintiff to relief. See De'Lonta at 631, n.1(dismissal standard under § 1915(e)(2)(B)(ii) same as standard for Fed. R. Civ. P. 12(b)(6)). Veney v. Wyche, 293 F.3d 726, 730 (4th Cir. 2002)(giving dismissal standard).

higher burden for the plaintiff. See Anderson, 477 U.S. at 256 (a plaintiff must do more than rest upon mere allegations in her pleadings). Accordingly, the plaintiff must do more than simply "allege" a serious or significant physical or emotional injury resulting from a sever deprivation. Plaintiff must set forth specific facts showing that there were serious or significant deprivations that resulted in physical or emotional injuries, and that such injuries were caused by the alleged deprivation. The plaintiff successfully presents facts indicating a serious mental injury.[5] However, the plaintiff does not make the requisite showing that her injuries were caused by deprivations in the Northern Regional Jail or that the deprivations themselves were severe.

Causation in § 1983 actions encompasses cause in fact and proximate cause. Shaw v. Stroud, 13 F.3d 791, 800 (4th Cir. 1994). The plaintiff has shown neither. The plaintiff offers Dr. Goodrich's letters, arguing that an alleged failure to follow the advice of these letters caused injury to Sabo. The letters only show that Sabo had sever mental issues going into the Northern Regional Jail. See Pl.'s Reply , Ex. A at 4-5. Dr. Goodrich's February 29, 2000 letter, which was drafted during Sabo's period of incarceration, informs officials of Sabo's preexisting mental condition and suggests the possible mitigating procedure of isolation. Id. at 5. Notwithstanding this recommendation, Dr. Goodrich repeatedly testified in his deposition that, according to his knowledge and his records, Sabo did not suffer any mental or physical injury as a result

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[5] This Court agrees with the plaintiff that psychological complications that reasonably create a known risk of suicide are serious medical needs. The December 3, 1999 and February 29, 2000 letters from treating psychiatrist, Warren P. Goodrich, D.O., indicating that the plaintiff had serious mental complications were sufficient to establish an injury, though insufficient to show causation. Pl.'s Reply, Ex. A at 4-5.

of her time in the Northern Regional Jail. See Defs.' Supp. Mem. Ex. AAA at 46-52.[6]

Further undermining the causation element in this case is the fact that Sabo only in the Northern Regional Jail for two days of every week during her period of incarceration. The parties agree that no suicide attempts occurred while she was actually in the custody of the Northern Regional Jail. See Pl.'s Reply to Defs.' Supp. Mot. at 11-12.[7] Indeed, the plaintiff herself was even unsure if her suicide attempts were caused by conditions in the Northern Regional Jail:

> Sabo: Oh, no, wait, you know what, I tried to kill myself and went to the crisis unit before I started serving my time in jail. And then Randy had me involuntarily committed while I was still going to jail, I do believe, it could be backwards. I'm not sure.

Pl.'s Reply, Ex. C at 22. And again:

> Q. Have you tried to kill yourself on more than one occasion?

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[6] Dr. Goodrich further testifies that jail, in general, "might have been a stressor involved with [Sabo's] suicide attempt." Id. at 46. However, even this statement does not help the plaintiff's cause. Dr. Goodrich does not specify the Northern Regional Jail; he merely refers to jail in general. In addition, Dr. Goodrich's statement is speculative, surmising only that jail "might" have lead to Sabo's suicide attempt.

[7] In fact, the Northwood Health System Triage Services Form and a Crisis Stabilization form completed pursuant to the plaintiff's September 2000 suicide attempt indicate Sabo was upset "over conflicts with her boyfriend" rather than unlawful treatment in the Northern Regional Jail. Defs.' Reply, Ex. DD.

A. Throughout my life?
Q. Yes.
A. Yes.
Q. How many occasions do you recall?
A. Probably four or five that I remember.

Id. at 24. And again:

Q. Do you remember why you tried to kill yourself in September of 2000?
A. Just upset and worrying about going to jail.

Id. at 25 (emphasis added). In sum, the plaintiff has not established the necessary causal link between her time in the Northern Regional Jail and her injury.

Furthermore, the plaintiff has not shown how the alleged deprivations were "severe" for purposes of the Eighth Amendment. The plaintiff alleges that the defendants: (1) placed the plaintiff in the general prison population instead of in isolation; (2) did not give adequate food and water with the plaintiff's medication; and (3) did not always properly give the plaintiff her medication. This Court reviews each of these allegations in turn.

First, the record indicates that placing the placing the plaintiff in isolation would probably have been more harmful than keeping her in the general population.[8] Specifically, prison officials testified that "isolation" in the jail consisted of a booking area with frequent traffic and a disciplinary cell

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[8] The plaintiff indicated that she was often kept in a cell by herself even when she was in general population. Pl.'s Resp. Ex. C at 65. Further more, the prison guards kept Sabo under observation when she was suicidal. See Defs.' Mot. Summ. J., Ex. L.

described as "the hole." Pl.'s Reply, Ex. D at 12-14. Indeed, Dr. Goodrich testified that keeping Sabo in the booking area could have made her "more anxious because she'd be a point of observation even to the point of having to use the bathroom facility." Defs.' Supp. Mem., Ex. AAA at 35. Finally, the jail officials screened Sabo each time she was incarcerated to determine whether her physical and mental conditions required isolation in the booking area. Mot. Summ. J., Ex. L. When it was determined that isolation was necessary, Sabo was isolated and monitored by jail personnel. Id. Accordingly, the choice to keep the prisoner in the general population was in the plaintiff's best interest.

Second, Sabo maintains that she was not provided with sufficient food or water. However, Sabo testified in her deposition that she always received additional water when she requested it. Pl.'s Reply Ex. C. at 78. This Court recognizes that Dr. Goodrich's December 3, 1999 letter recommends that Sabo's medication be taken with food.[9] However, the plaintiff has not presented any factual basis demonstrating that she received no food with her medication or how the lack of food with her medication constituted a "severe deprivation." Furthermore, the plaintiff never filed a grievance or entered a formal complaint indicating that she was receiving her medication improperly.[10] While the lack of a formal grievance regarding medication is not dispositive of this issue, it constitutes evidence that the plaintiff was not

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[9] It should be noted that the plaintiff testified that the prescription bottle for her medication contained no instructions indicating that food should be taken with the medication. Pl.'s Reply. Ex. C at 36.

[10] As stated above, the plaintiff was given a handbook outlining the grievance procedure and she was instructed on how to file such a grievance. See Mot. Summ. J., Ex. D.

suffering from the "severe deprivation" alleged.

Finally, Sabo argues that she was not always provided with her necessary medications. Again, Sabo filed no grievance with regard to her medication. In addition, Sabo presents no factual evidence that suggests she did not receive medications. To the contrary, medication charting records kept by the Northern Regional Jail indicate that the plaintiff was given her medication while incarcerated. Defs.' Mot. Summ. J., Ex. M. Accordingly, this Court finds that the plaintiff cannot satisfy the first prong of the Eighth Amendment analysis under § 1983, and therefore, the defendants' motion for summary judgment must be granted.

2. Plaintiff Cannot Show Deliberate Indifference

Even if the plaintiff survived the requirements under the first prong, she fails to show that the defendants acted with deliberate indifference as required under the second prong of the Eighth Amendment analysis. As noted in Miltier v. Beorn, 896 F.2d 848 (4th Cir. 1990), deliberate indifference to the serious medical needs of a prisoner must be demonstrated by either actual intent or reckless disregard. In other words, the defendants' indifference to a prisoner's medical needs must be so significant that it offends "evolving standards of decency." Estelle v. Gamble, 429 U.S. 97, 102 (1976). Furthermore, the official "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Rich v. Bruce, 129 F.3d 336, 338 (4th Cir. 1994) (citing Farmer v. Brennan, 511 U.S. 825 (1994)).

The plaintiff argues that this subjective element is satisfied because the defendants ignored a court order concerning Sabo's treatment as well as the recommendations of the plaintiff's treating psychologist, Dr. Goodrich. The

plaintiff contends that the refusal to follow outside orders demonstrates a "pattern and practice and policy" of resisting such orders unless confirmed by prison doctors. Resp. at 9. This Court disagrees.

As stated above, Dr. Goodrich's December 3, 1999 and February 29, 2000 letters recommended isolation and indicated that certain medications needed to be taken with food. Ex. A. Ohio County Magistrate Rose M. Humway entered a Medication Order directing the Northern Regional Jail to comply with the medical orders/requests of Dr. Goodrich and to provide appropriate prescription medication to Sabo. After receiving the second letter and a motion from Sabo's defense counsel for the jail to abide by the letters, Magistrate Humway drafted her own letter promising to review Dr. Warren's suggestions and "comply if possible." Ex. B. Based on the content of these letters and Magistrate Humway's order, there is no indication that they were ignored.

As stated above, "isolation" in the Northern Regional Jail would have consisted of confinement in the booking area where Sabo would have remained in plain view of an area with constant traffic. P.'s Resp., Ex. D at 12-14. Such confinement would probably have been more taxing on Sabo's psychological health, as acknowledged by Dr. Goodrich's deposition testimony. Defs.' Supp. Mem., Ex. AAA at 35. Accordingly, the Northern Regional Jail took measures to ensure compliance with the spirit of Dr. Goodrich's recommendations and thus complied with the subsequent Medication Order. The plaintiff was physically and psychologically evaluated by the jail's medical personnel each time she was incarcerated. Mot. Summ. J., Ex. H and I. If officials found Sabo to be suicidal, she was placed on "suicide watch" in a holding cell with regular monitoring. Id., Ex. L. Factual evidence indicates that she regularly

received her medication. Id., Ex. M. In sum, the Northern Regional Jail monitored Sabo's psychological health, took steps to ensure the plaintiff would not suffer any severe deprivations, and responded reasonably to the risks presented in Dr. Goodrich's evaluation. See Farmer v. Brennan, 511 U.S. 825, 844 (1994) (finding that prison officials who know of a substantial risk of harm and act reasonably may be free from liability, even if harm ultimately occurs). Therefore, the plaintiff has not established that the subjective acts of the defendants violated her Eighth Amendment right against cruel and unusual punishment, and summary judgment for the defendants is warranted.

B. Qualified Immunity

Defendants argue that Canterbury and Spencer are further protected from liability under the doctrine of qualified immunity. This Court agrees. Government officials are liable only of "they have engaged in conduct that violates clearly established constitutional rights of which a reasonable person would have known." Pritchett v. Alford, 973 F.2d 307, 312 (4th Cir. 1992) (quoting Harlow v. Fitzgerald, 457 U.S. 8000, 818 (1982) (internal quotation marks omitted)). This Court has already found that no constitutional right was violated, and thus the analysis is essentially complete. However, even if a clearly established constitutional right had been violated, the conduct of Canterbury and Spencer would still fall under the protections of qualified immunity because their conduct did not "create a pervasive and unreasonable risk of constitutional injury." See Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir. 1994).

A court's determination of the reasonableness for purposes of qualified immunity must be made "on the basis of information actually possessed by the officer at the critical

time" in question and "in light of any exigencies of time and circumstance that reasonably may have affected the officer's perceptions." Pritchett at 313. The plaintiff argues that defendant Spencer is not protected by qualified immunity because he personally reviewed Dr. Goodrich's letters and Magistrate Humway's order, recognized that failure to follow this information was clearly a constitutional violation, but nevertheless failed to comply. With regard to Canterbury, the plaintiff contends qualified immunity is ineffective because Canterbury established a policy which actively sought to ignore or modify medical orders or recommendations regarding inmates.

The plaintiff's argument is without merit. The plaintiff relies on the assumption that Dr. Goodrich's letters and Magistrate Humway's order required Sabo's placement in isolation. This interpretation is contrary to the plain language of these documents. Dr. Goodrich's first letter asks the jail officials to "consider" isolation and his second letter merely "encourage[s] isolation." Mot. Summ. J., Ex. A. Similarly, Magistrates Humway's Order directs the jail to provide Sabo with medication, but does not require jail officials to keep her in isolation. The order simply states that the jail shall comply with "the medical order/requests." The letters ultimately request action for the sake of Sabo's mental health and such action was taken.

Perhaps most importantly, Canterbury and Spencer's particular compliance with the letters of Dr. Goodrich, and with the magistrate's order, did not create a "pervasive and unreasonable risk of constitutional injury." Shaw at 799. As explained above, the physical and psychological evaluations of Sabo upon arrival, the suicide watch, the regular distribution of Sabo's medication, the lack of grievance on the part of Sabo, and the actual nature of facilities available at the Northern Regional Jail all indicate that Canterbury and

Spencer established and maintained reasonable conditions for Sabo in light of her mental and physical health, and the exigencies of time and circumstance. Accordingly, both Canterbury and Spencer are protected by qualified immunity.

C. Failure to Exhaust Remedies No Bar

The defendants argue that because the plaintiff did not file any grievance and did not attempt to exhaust her administrative remedies available to her while in prison, her claim is barred by 42 U.S.C. § 1997e(a). This Court already addressed the issue of exhaustion in its August 9, 2004, finding that the exhaustion requirement does not apply to the plaintiff because she filed her complaint after she was released from the Northern Regional Jail. Nothing in the plaintiff's motion for summary judgment convinces this Court to change its initial ruling. Accordingly, the plaintiff's action is not barred for failure to exhaust alternative remedies.

D. State Law Causes of Action Barred

In addition to her § 1983 claim, the plaintiff's complaint includes state law causes of action for intentional infliction of emotional distress, negligence and failure to provide adequate medical are and/or confinement conditions consistent with plaintiff's medical condition. As a general matter, West Virginia's Governmental Tort Claims and Insurance Reform Act, W.Va. Code §§ 29-12A-1, et seq., provides that a political subdivision is immune from liability resulting from the execution or enforcement of the lawful orders of any court. Furthermore, employees of a political subdivision are generally immune from any loss or claim unless they act: (1) outside the scope of employment, (2) with

malicious purpose, in bad faith or in a wonton or reckless manner, or (3) liability is specifically expressed by law. W. Va. Code § 29-12A-5. This Court finds that the Northern Regional Jail was executing and enforcing the lawful sentence of Sabo imposed by the Magistrate Court of Ohio County, West Virginia. Moreover, this Court finds that the officials of the Northern Regional Jail were operating within the scope of their employment and without malicious purpose, as explained above. Therefore, this Court finds that the plaintiff's state law claims against the defendants are barred as a matter of law and must be dismissed.

However, even if the plaintiff's claims are not barred pursuant to West Virginia's Tort Claim Act, the plaintiff has not established key elements to each of her state law claims. In West Virginia, intentional infliction of emotional distress requires a showing of "extreme and outrageous conduct that intentionally or recklessly causes severe emotional distress to another." See Harless v. First Nat'l Bank in Fairmont, 289 S.E.2d 692, 693 (W. Va. 1982) (distinguished on other grounds). As stated above, the plaintiff has failed to show that the defendants acted improperly, let alone recklessly or with an intention to cause sever emotional distress. The plaintiff has also failed to satisfy the elements of a negligence claim, which requires a defendant to breach a duty and proximately cause an injury to the plaintiff. Strahn v. Cleavenger, 603, S.E.2d 197, 205 (W. Va. 2004). This Court has already found that the plaintiff has not established causation between the alleged breach of duty by the defendants and Sabo's alleged injuries. Accordingly, the plaintiff's negligence claim fails. Finally, the plaintiff has not demonstrated liability based on failure to provide medical care or confinement conditions. As stated above, the record shows that the plaintiff received her medication regularly and was confined in a manner consistent with Dr. Goodrich's

recommendations and the Ohio County Magistrate Court's order.

V. Conclusion

For the reasons states above, the defendants' motion for summary judgment in the aboye-styled civil action is hereby GRANTED. Accordingly, this civil action is DISMISSED and STRICKEN from the active docket of this Court.

IT IS SO ORDERED.

The Clerk is DIRECTED to transmit a copy of this memorandum opinion and order to counsel of record herein. Pursuant to Federal Rule of Civil Procedure 58, the Clerk is DIRECTED to enter judgment on this matter.

DATED: June 16, 2005

/s/ Frederick P. Stamp, Jr.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE

Northwood Health Systems

December 3, 1999

RE: Tammy Sabo

To Whom It May Concern:

Ms. Tammy Sabo is my patient. She suffers from a panic disorder, and agoraphobia. Her condition is exacerbated by being around other people. It would be of utmost benefit if consideration could be given to keeping her isolation during the time of her confinement. In addition, she is on several medications that should be taken with food.

Thank you.

Sincerely yours,

/s/ Warren P. Goodrich
Warren P. Goodrich, D.O.
Diplomate, American Board of
Psychiatry and Neurology

WPB/kjs

2121 Eoff Street Wheeling, WV 26003 (304) 234-3570

NORTHWOOD HEALTH SYSTEMS INC. IS A PRIVATE NON-PROFIT CORPORATION

IN THE MAGISTRATE COURT OF OHIO COUNTY,
WEST VIRGININA

STATE OF WEST VIRGINIA,

Plaintiff, Case No. 99-222

v. Honorable Rose M. Humway

TAMMY R. SABO,

Defendant.

MEDICATION ORDER

The 15th day of December, 1999, came the State by its counsel, William J. Ihlenfeld, II, Assistant Prosecuting Attorney; as well came the defendant Tammy R. Sabo, in person and by her counsel, Kevin Stryker, Assistant Public Defender, in accordance with the Court's setting the matter for hearing on the terms and conditions of the defendant's serving of the sentence herein.

Whereupon the Court heard the request of the defendant based on the medical treatment rendered by her treating physician, Warren Goodrich, D.O., of Northwood Health Systems, that the Court require the Northern Regional Jail to comply with the treating physician's orders/requests and provide the prescription medicine to Tammy Sabo during the periods of time she is serving her sentence at the Northern Regional Jail.

The Court, being of the opinion the relief requested was proper, and hearing no objection thereto, accordingly

ORDERS the Northern Regional Jail to comply with the medical orders/requests and provide the prescription medicine to Tammy Sabo from her treating physician,

Warren Goodrich, D.O. of Northwood Health Systems.

SO ORDERED.

ENTER this 21s day of December, 1999.

/s/ Rose M. Humway
Magistrate

A COPY TESTE:
/s/ Barbara J. Sinclair
CLERK

Northwood Health Systems

February 29, 2000

RE: Tammy Sabo

To Whom It May Concern:

I have been treating Tammy Sabo for many years for depression and agoraphobia. She is now serving time on weekends in the jail. I feel that she needs to be separated, and kept in her own cell away from the rest of the jail community in order to prevent serious complications. She could easily become suicidal as a result of experiencing intense, severe amounts of anxiety due to her placement in the general jail community. Please encourage isolation in order to maintain this patient's current level of mental health.

Sincerely yours,

/s/ Warren P. Goodrich
Warren P. Goodrich, D.O.
Diplomate, American Board of
Psychiatry and Neurology

WPB/kjs

2121 Eoff Street Wheeling, WV 26003 (304) 234-3570

NORTHWOOD HEALTH SYSTEMS INC. IS A PRIVATE NON-PROFIT CORPORATION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
WEST VIRGINIA AT WHEELING

TAMMY SABO,

Plaintiff,

v. Civil Action No. 5:03CV84
(STAMP)

STEVEN CANTERBURY, individually and in his capacity as Director, WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILLITY AUTHORITY, and JAMIE SPENCER, individually and in his capacity as Warden, NORTHERN REGIONAL JAIL AND CORRECTIONAL FACILITY,

Defendants.

AMENDED COMPLAINT

AND NOW comes Plaintiff, Tammy R. Sabo, by and through her counsel, Peter M. Suwak, Esquire, who files the following Amended Complaint:

INTRODUCTION

1. Plaintiff Tammy R. Sabo is an adult individual, a citizen of the United States, with her residence at 159 Miller Street, Wheeling, West Virginia 26003.

2. Defendant Steve Canterbury is a resident of the State of West Virginia and is always has been, at all times pertinent hereto, the Director

2. Defendant Northern Regional Jail and Correctional Facility is a West Virginia correctional facility with offices located at R.D. #2, Moundsville, WV 26041.

3. Defendant Jamie Spencer was at all relevant times the Warden of the Northern Regional Jail and Correctional Facility, a West Virginia correctional facility with offices located at R.D. #2, Moundsville, WV 26041.

STATEMENT OF FACTS

4. On or about March 3, 1999, upon he r plea of guilty to Domestic Battery in Case No. 99M-222-H in the Magistrate Court of Ohio County, West Virginia, Plaintiff was sentenced by Ohio County Magistrate Rose M. Humway to one year in the Northern Regional Jail. All but 6 months and one day of that sentence was suspended in lieu of a one year probationary period. The Plaintiff was to serve the six months and one day on 91 consecutive weekends.

5. After serving two of the weekends, plaintiff requested that due to her medical condition that she be permitted to serve the balance of her sentence on home confinement without electronic monitoring. The sentence was stayed pending the decision on the request. On December 3, 1999, the request was denied by the Honorable Arthur M. Recht, Judge of the Circuit Court of Ohio County, and it was ordered that the sentence be imposed immediately with credit for two weekends already served. A copy of the Order is attached as Exhibit A.

6. The Magistrate was informed concerning the medical condition of the plaintiff on December 15, 1999, and as a result issued a Medication Order on December 21, 1999, that the Northern Regional Jail was to comply with plaintiff's

treating physician's orders/requests and provide prescription medicine to Tammy Sabo during the periods of time she was serving at the jail. A copy of the Medication Order is attached hereto as Exhibit B.

7. The medical condition diagnosed by her treating physician Warren P. Goodrich, D.O. included a diagnosis of Panic Disorder with moderate agoraphobia, Social Phobia, Alcohol Abuse and possible Schizotypal Personality Disorder. On or about February 19, 2000, her treating physician issued a letter indicating that because of her depression and agoraphobia she needed to be separated and kept in her own cell away from the rest of the jail community. See letter attached hereto as Exhibit C. Magistrate Humway called the Northern Regional Jail and informed them of the needs set out by Dr. Goodrich.

8. Notwithstanding the Medication Order and letter from the treating physician, the jail refused to isolate her from the general population which included federal prisoners and prisoners who were felons. Additionally, she was not always given her prescription medication at the proper time and sometimes was given said medication without food although the prescription required them to be taken with food to prevent stomach problems.

9. This treatment, or lack thereof, continued up until her final release from the jail which took place on or about June 20, 2001.

COUNT I - CIVIL RIGHTS VIOLATIONS

10. The averments of Paragraphs 1 through 9 are hereby incorporated as though fully set forth at length.

11. This court's jurisdiction is invoked pursuant to 28 U.S.C. §1331.

12. Defendants, their agents and employees, with knowledge of plaintiff's medical needs, and/or with deliberate indifference to such medical needs, have acted or failed to act in such a way as to deprive plaintiff of necessary and adequate medical care and/or confinement conditions appropriate to her medical condition, thereby endangering the plaintiff's health and well-being. Such acts and omissions of the defendants violate rights secured to the plaintiff under the Fifth, Eighth, Ninth and Fourteenth Amendments.

13. Defendants, knowing of the medical needs of the plaintiff and with deliberate indifference to the inadequacies and deficiencies in the medical and other staffing and procedures at the Northern Regional Jail have failed and neglected to establish and implement policies, practices and procedures designed to assure that plaintiff receive medical treatment and care and/or confinement conditions appropriate to her medical condition at the standards therefor in the West Virginia Regional Jail & Correctional Facility Authority, or have adopted policies, practices and procedures which defendants knew, or reasonably should have known, would be ineffective in delivering medical treatment and care at such standards, thereby endangering the plaintiff's health and well-being in violation of rights secured to plaintiff by the Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution.

14. Defendants, knowing of the medical needs of the plaintiff and with deliberate indifference to such needs, have failed to instruct, supervise or train their employees and agents in such a manner as to assure the delivery of adequate

medical care to plaintiff and/or confinement conditions consistent with her medical condition, thereby endangering the plaintiff's health and well-being in violation of the Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution.

15. The defendants' actions and/or omissions were negligent and/or reckless and/or intentional.

16. The defendants' actions and/or omissions were committed under color of law and/or pursuant to policies, customs, practices, rules, regulations, ordinances, statutes and/or usages of the State of West Virginia, the West Virginia Regional Jail & Correctional Facility Authority and/or the Northern Regional Jail and Correctional Facility.

17. These actions have served to deprive the Plaintiff of his civil rights, as previously outlined, under color of law, and hence violate the United States Constitution and are actionable under 42 U.S.C. §1983.

18. As a result of the aforementioned, Plaintiff has been damaged as follows:

a. Severe emotional distress and related physical trauma, including, but not limited to, headaches, upset stomach, nightmares, nervousness, shortness of breath due to panic attacks, involuntary jumping at the slightest provocation, and the constant tightening of the muscles in the neck and chest producing pain and discomfort.

b. Pain, suffering, inconvenience, loss of enjoyment of life, annoyance and other emotional distress.

c. Entitlement to punitive damages due to outlined outrageous conduct.

d. Declaration of violation of rights, as outlined.

e. Medical bills in an amount to be determined and continuing.

f. Entitlement to counsel fees and costs per 42 U.S.C. §1988.

WHEREFORE, Plaintiff demands judgment against Defendants, jointly, severally, and individually in an amount to be determined by the jury and costs and such other relief as the Court deems proper. JURY TRIAL DEMANDED.

COUNT II - INTENTIONAL INFLICTION OF MENTAL DISTRESS

19. The averments of Paragraphs 1 through 18 are hereby incorporated as though fully set forth at length.

20. The facts previously outlined constitutes the state tort of intentional infliction of mental distress. This Court is requested to accept jurisdiction pursuant to the exercise of PENDENT JURISDICTION.

21. As a result of the conduct, Plaintiff suffered damages as previously outlined in Paragraph 18.

WHEREFORE, Plaintiff demands judgment against Defendants, jointly, severally, and individually in an amount to be determined by the jury and costs and such other relief as the Court deems proper. JURY TRIAL DEMANDED.

COUNT III - NEGLIGENCE

22. The averments of Paragraphs 1 through 21 are hereby incorporated as though fully set forth at length.

23. The facts previously outlined constitutes the state tort of negligence, particularly in failing to follow the order of the court. This Court is requested to accept jurisdiction pursuant to the exercise of PENDENT JURISDICTION.

24. As a result of the conduct, Plaintiff suffered damages as previously outlined in Paragraph 18.

WHEREFORE, Plaintiff demands judgment against Defendants, jointly, severally, and individually in an amount to be determined by the jury and costs and such other relief as the Court deems proper. JURY TRIAL DEMANDED.

COUNT IV - FAILURE TO PROVIDE ADEQUATE MEDICAL CARE AND/OR CONFINEMENT CONDITIONS CONSISTENT WITH PLAINTIFF'S MEDICAL CONDITION

25. The averments of Paragraphs 1 through 24 are hereby incorporated as though fully set forth at length.

26. The facts previously outlined constitutes a state tort for the failure to provide adequate medical care and/or confinement conditions consistent with plaintiff's medical condition in violation of the West Virginia Constitution, statutory and/or common law. This Court is requested to accept jurisdiction pursuant to the exercise of PENDENT JURISDICTION.

27. As a result of the conduct, Plaintiff suffered damages as previously outlined in Paragraph 18.

WHEREFORE, Plaintiff demands judgment against Defendants, jointly, severally, and individually in an amount to be determined by the jury and costs and such other relief as the Court deems proper. JURY TRIAL DEMANDED.

Respectfully submitted,

/s/ Peter M. Suwak
Peter M. Suwak, Esquire
Counsel for Plaintiff
PA I.D. # 23779
W. Va. I.D. #9508
Pete's Surplus Building
P. O. Box 1
Washington, PA 15301
(724) 228-4885

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amended Complaint was served by U. S. First Class Mail, postage prepaid, upon the following:

David L. Wyant, Esquire
Bailey & Wyant, P.L.L.C.
1219 Chapline Street
Wheeling, WV 26003

Chad M. Cardinal, Esquire
Regional Jail and Correctional Facility Authority
1325 Virginia Street, East
Charleston WV 25401-3011

Dated: August 24, 2004 By: /s/ Peter M. Suwak

Peter M. Suwak, Esquire
Counsel for Plaintiff
PA I.D.# 23779
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(2)

No. 06-154

FILED
SEP 1 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the
Supreme Court of the United States

TAMMY SABO,

Petitioner,

v.

STEVE CANTERBURY, individually and in his capacity as Director, WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY; JAMIE SPENCER, individually and in his capacity as Warden; NORTHERN REGIONAL JAIL AND CORRECTIONAL FACILITY

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the district court committed an error of law in granting summary judgment to Canterbury and Spencer in finding that Tammy Sabo failed to establish objectively the deprivation of a basic human need that was sufficiently serious in violation of her Eighth Amendment right against cruel and unusual punishment pursuant to 42 U.S.C. § 1983 while she was periodically incarcerated at the Northern Regional Jail, which decision was affirmed by the United States Court of Appeals for the Fourth Circuit.

II. Whether the district court committed an error of law in granting summary judgment to Canterbury and Spencer in finding that Tammy Sabo failed to establish that the prison officials subjectively acted with a sufficiently culpable state of mind in violation of her Eighth Amendment right against cruel and unusual punishment pursuant to 42 U.S.C. § 1983 while she was periodically incarcerated at the Northern Regional Jail, which decision was affirmed by the United States Court of Appeals for the Fourth Circuit.

III. Whether the district court committed an error of law in granting summary judgment to Canterbury and Spencer pursuant to the doctrine of qualified immunity finding that even if Tammy Sabo had established a constitutional violation, the conduct of Canterbury and Spencer did not create a pervasive and unreasonable risk of constitutional injury, which decision was affirmed by the United States Court of Appeals for the Fourth Circuit.

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STATEMENT OF THE CASE

Tammy Sabo initiated a civil rights action pursuant to 42 U.S.C. §1983 on or about June 20, 2003 against Steven Canterbury, individually and as Director of the West Virginia Jail and Correctional Facility Authority, James Spencer, individually and as Warden of the Northern Regional Jail, the Northern Regional Jail and Correctional Facility Authority and the West Virginia Regional Jail and Correctional Facility Authority alleging that she was denied proper medical care and confinement conditions during periodic incarcerations at the Northern Regional Jail.[1] Additionally, Ms. Sabo alleged a number of state law claims also pertaining to her medical care and confinement conditions at the Northern Regional Jail.[2]

On or about June 16, 2005, the Honorable Frederick P. Stamp, Jr. issued a Memorandum Opinion and Order Granting the Defendants' Motion for Summary Judgment.[3]

---

[1] The Northern Regional Jail and Correctional Facility is a part of the Regional Jail system under the control of the West Virginia Regional Jail and Correctional Facility Authority and provides facilities for incarceration of individuals convicted of crimes not requiring confinement in the State prison system from the counties of Hancock, Brooke, Ohio, Marshall and Wetzel. *See: W. Va. Code §31-20-1 et seq.*

[2] The petitioner does not raise these State Court issues in her petition except simply to identify the State Court claims under the "Questions Presented For Review" section on page i in the petition. These issues will not be further addressed in this Brief in Opposition to Petition.

[3] The District Court had previously dismissed the constitutional claims against the individual defendants in their official capacities and the agency defendants. These claims also were not the subject

The district court held that Ms. Sabo failed to establish the elements necessary to maintain the § 1983 claim. The District Court held that the plaintiff could not meet the objective prong of an Eighth Amendment claim. Specifically, Ms. Sabo did not show a "serious or significant physical or emotional injury resulting from the challenged conditions."[4] Further, the District Court held that Ms. Sabo could not satisfy the subjective prong of an Eighth Amendment claim to establish that the jail officials showed deliberate indifference. Additionally, the Court held that Canterbury and Spencer were entitled to qualified immunity. On March 30, 2006, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's decision and on April 28, 2006, denied Appellant's Motion for rehearing En Banc.

STATEMENT OF FACTS

On March 3, 1999, Tammy Sabo pled guilty to domestic battery second and was sentenced by Ohio County Magistrate Rose M. Humway to serve a sentence of six months and one day over 91 consecutive weekends at the Northern Regional Jail. *Magistrate Court of Ohio County Order (App., Vol. I, p. 69a).* Ms. Sabo began serving her sentence on March 12, 1999. After serving two weekends, Ms. Sabo filed a petition requesting she be permitted to finish her sentence on home confinement. On December 13, 1999, the Circuit Court denied Ms. Sabo's Petition for Alternative Sentence and immediately reimposed the original sentence giving credit for

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of appeal and will not be further addressed in this Brief, leaving the constitutional claims against Canterbury and Spencer in their individual capacities as the only claims subject to the Petition herein and this Brief in Opposition to the Petition.

[4] The District Court quoted *De' Lonta v. Angelone*, 330 F. 3d 630, 634 (4th Circuit 2003).

the 2 weekends previously served. *December 13, 1999 Order (App., Vol. I, pp. 70a-71a).* On December 17, 1999, a "MEDICATION ORDER" was issued by Ohio County Magistrate Humway directing the Northern Regional Jail "...to comply with medical orders/requests and provide the prescription medicine to Tammy Sabo from her treating physician, Warren Goodrich, D.O. of Northwood Health Systems". *Medication Order, December 17, 1999 (App., Vol. I, pp. 72a-73a).*

On December 3, 1999, Ms. Sabo's treating physician, Warren Goodrich, D.O., issued a "To Whom it May Concern" letter indicating "it would be of upmost benefit if consideration could be given to keeping her [sic] isolation during the time of her confinement." *December 3, 1999 letter (App. Vol. III, p. 1142a).* On or about February 29, 2000, Dr. Goodrich issued a second "To Whom It May Concern" letter encouraging isolation for Ms. Sabo while serving her time in jail. *February 29, 2000 letter (App., Vol. III, p. 1143a).* On or about May 17, 2000, Ms. Sabo's sentence was modified to allow her to serve her two day per week sentence on Wednesdays through Fridays to ensure that a mental health provider was available during her incarceration. She completed her sentence on June 23, 2001 without injury or incident.

On June 20, 2003, Tammy Sabo filed her civil complaint in the United States District Court for the Northern District of West Virginia. Ms. Sabo claimed that Respondents Canterbury and Spencer were indifferent to her medical needs in violation of 42 U.S.C. §1983. Specifically, Ms. Sabo alleged that Canterbury and Spencer as well as the Jail employees failed to follow the suggestions of her treating physician, Warren P. Goodrich, D.O., that she be kept isolated during her periodic confinements, in light of her medical/mental conditions. Ms. Sabo also alleged that the

failure to follow Dr. Goodrich's recommendation increased her risk of suicide while she was incarcerated. Further, Ms. Sabo alleged that the jail personnel did not administer her prescription medications at the proper time or in the proper manner.

While serving her sentence, Ms. Sabo never filed any grievances with the jail. A formal grievance procedure was in effect during the entire period of Tammy Sabo's incarceration and she could have raised medication and/or housing confinement issues. Ms. Sabo was made aware of the grievance procedure as she received a prisoner's handbook on each occasion that she reported to the jail to serve her intermittent sentence (approximately 91 occasions). *Jail Documentation (App., Vol. I, pp. 74a-124a).* Sabo testified that she never tried to file a grievance. *(App., Vol. II, p. 339a).* In explanation, Sabo stated that she believed that she was not there long enough to file a grievance because she believed that two days was not enough time for the grievance to be decided. *(App., Vol. II, pp. 338a).* However, the petitioner agreed that she was there for two days each week over a long period of time which would allow for the resolution of any grievance. *(App. Vol. II at p. 339a).*

Uncontroverted evidence shows that on each occasion when Ms. Sabo presented at the jail to serve her 2 day intermittent sentence, she was evaluated by the correctional booking officer as well as the on-staff nurse who evaluated her for physical and mental health conditions, including the potential for suicide. *Initial Classification Summary documents (App., Vol. II, pp. 389a-428a); Prime Care Receiving Screening/Health Assessment documents (App., Vol. II, pp. 429a-602a); Prime Care Intake Mental Health Screening documents (App., Vol. II, pp. 603a-670a).* The medical evaluations by the medical professionals were performed as a part of the policies of the Jail. The medical

evaluations were performed by medical employees of Prime Care Medical of West Virginia, Inc. ("Prime Care"), who had a contract to provide medical care at the Northern Regional Jail. Prime Care is approved and certified by the National Commission on Correctional Health Care. *(App. Vol. III, pp. 1171a-1172a).* Additionally, she was evaluated by correctional officers of the jail, who had received training with regard to booking procedures, classification of inmates and suicide. *Jail documentation (App., Vol. II, pp. 671a-699a).* The evaluation by the booking officers at the beginning of each of Ms. Sabo's confinements also was part of the policies of the Jail. *Jail documentation (App., Vol. II, pp. 671a-699a).* On several occasions, it was determined that Ms. Sabo was deemed to be suicidal when she presented herself to the jail for her incarceration and therefore was kept in a holding cell under suicide watch with 15 minute periodic observations by jail personnel. *Jail documentation (App., Vol. II, pp. 832a-860a).*[5]

The evidence further shows that Ms. Sabo regularly received her medications while she was serving the two day intermittent sentence. *Prime Care Medical documentation (App., Vol. II, pp. 861a-892a).* According to the testimony of Kandi S. Blake, the medical administrator for Prime Care at the Northern Regional Jail, the charting reflects that Tammy Sabo did receive her medication. At times, there were

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[5] In the Petition, Ms. Sabo cites her own testimony indicating that there were occasions when she was deemed suicidal but was placed in the general population and checked every hour or so. *See: Petition at p. 22.* Ms. Sabo's testimony is uncorroborated. Rather, the documentary evidence in the case indicates that when Ms. Sabo was placed on suicide watch, she was held in a holding cell and checked on a 15-minute basis. *(App. Vol. II, pp. 834a-859a).*

chart entries indicating that Tammy Sabo refused her medication when offered. *(App. Vol. III, pp. 1257a-1258a).*

Importantly, during the five days of each week that she was not incarcerated at the Northern Regional Jail, Ms. Sabo admits that she never pursued any outside mental health or other treatment with respect to her claims of alleged mistreatment at the jail. *Sabo Deposition at pp. 85, 88, 94, 102, 113 (App., Vol. II, pp. 358a, 361a, 367a, 375a, 386a).* Ms. Sabo also admits that she did not receive and is not currently receiving any medical or psychiatric treatment as a result of her incarceration or the way she was treated in jail. *Sabo Deposition at p. 113 (App., Vol. II, p. 386a).*

Ms. Sabo has alleged that she had one conversation with Respondent Warden James Spencer regarding her claim that her afternoon medication was not being timely administered. *Sabo Deposition at pp. 74-76 (App., Vol. II, pp.347a-349a).* Mr. Spencer denies this conversation and there are no documents reflecting any such conversation. *Spencer Deposition at p. 71 (App., Vol. II, p. 770a).* Additionally, as previously stated, the *Petitioner* filed no grievances during her incarcerations. Further, there is no record of any medical or mental health treatment needed by Ms. Sabo as a result of an allegation of failure to timely provide medications to the *Petitioner. Sabo Deposition at p. 94 (App., Vol. II, p. 367a).*

Ms. Sabo admitted that she never spoke with Respondent Steven Canterbury, Director of the West Virginia Jail and Correctional Facility Authority, and did not know who he was at the time of her deposition. *Sabo Deposition at p. 77 (App., Vol. II, p. 350a).*

The developed testimony of Respondent James Spencer as well as Shar Murrin, Director of Inmate Services for the Northern Regional Jail, indicates that the letters of Ms. Sabo's treating physician, Warren Goodrich, D.O., were received

and considered by the staff at the jail. The testimony is that the staff did not believe that these letters constituted medication orders or requests and instead constituted suggestions by Dr. Goodrich. *Spencer Deposition at pp. 53-54, 61, 66-68 (App., Vol. II., pp. 752a-753a, 760a, 765a-767a) and Murrin Deposition at pp. 47-48, 57 and 103 (App., Vol. III, pp. 940a-941a, 950a, 996a).* The staff therefore followed the regular processes of the jail during the booking procedure including the mental health status evaluation by the Prime Care medical personnel, the booking evaluation by the trained correctional officers and a decision on housing classification was made each time Ms. Sabo presented herself to serve her weekly sentence. *See generally: Jail documentation (App., Vol. II, pp. 389a-670a).* As further consideration of Dr. Goodrich's letters, Shar Murrin contacted Magistrate Humway to discuss the Medication Order and to inform Humway of the jail's housing classification actions as it pertained to Ms. Sabo.[6] According to the uncontroverted testimony of Ms. Murrin, Magistrate Humway agreed with the procedures of the jail in that regard. *Murrin Deposition at pp.74, 77-78, 81 (App., Vol. III, pp. 967a, 970a-971a, 974a).*

On or about March 2, 2000, Magistrate Humway wrote to Ms. Sabo's criminal counsel, Public Defender Jack Wood, apparently following a conversation with Ms. Murrin and a motion filed by Ms. Sabo pertaining to the letters of Dr. Goodrich. *(App., Vol. III, p. 1152a).* The Jail was not copied on this correspondence and had no knowledge of the existence of this letter until after suit was filed in this matter, following Tammy Sabo's release. Magistrate Humway directed

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[6] The Petitioner states that "This clear order was not followed by the jail." See: Petition at p. 6. There is however no support for this assertion in the record.

Attorney Wood to draft an Order regarding Dr. Goodrich's recommendations which she would review and comply with, if possible. Apparently, Attorney Wood never drafted such an Order and the Jail never received it. Thus, there was no Order in place related to the housing of Ms. Sabo while incarcerated. On the contrary, the Magistrate's directive to Attorney Wood to prepare a separate Order for her consideration on this issue confirms that the Magistrate's December, 1999 Medication Order did not encompass the December, 1999 and February 2000 Goodrich letters encouraging certain housing of Tammy Sabo.

Despite the Petitioner's contention otherwise, Magistrate Humway's Order dealt exclusively with administration of medication. There is no language in Magistrate Humway's Order which could be interpreted to refer to the Petitioner's contention that the Order contained a "direction that Sabo be isolated to minimize the effects with interaction with the general jail population."[7] The District Court Judge's Order states:

> "Similarly Magistrate Humway's order directs the jail to provide Sabo with medication, but does not require jail officials to keep her in isolation. The order simply states that the jail shall comply with the medical order/request." *(App. Vol. III, pp. 1425a-1426a).*

The order is in no way susceptible to more than one interpretation. The Order issued by Magistrate Humway is clearly titled "Medication Order." Further, there is no

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[7] See: Petition at page 6.

mention of isolation in that Order whatsoever. *(App. Vol. I, pp. 72a-73a).*[8]

The author of these letters indicated that they were not orders. Dr. Goodrich stated that he had no authority to order isolation at the Northern Regional Jail. *Goodrich deposition at Page 89 (App. Vol. III, pp.1402a).* Additionally, Dr. Goodrich agreed that in light of Tammy Sabo's psychological problem, it would be better to house her in a cell in the general population than in an insolation cell available in the booking area. The isolation cells in the booking area had glass fronts and provided no privacy to the occupant. Dr. Goodrich stated that if he had to choose between the cells and general population, he believes the cell in the general population would be more appropriate to address his concerns.[9] *Goodrich deposition at Page 35-36 (App. Vol. III,*

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[8] The Petitioner asserts that it was inappropriate for U. S. District Court Judge Stamp to apply the plain language of the Medication Order and not further interpret the plain language therein. However, it has long been the law that when a document's language is unambiguous, the court will apply the plain, ordinary or popular sense of the language. Unambiguous terms in a document take their plain, ordinary and popular meaning. *See: i.e., U. S. Fidelity & Guaranty Company v. Guenther,* 281 U.S. 34, 50 S.Ct. 165 (1930).

[9] The Petitioner asserts that this testimony of Dr. Goodrich pertains only to a hypothetical question. However, this testimony is based on the facts as developed in this case. Respondent Steven Canterbury, the Director of the West Virginia Regional Jail and Correctional Facility Authority, testified that there are two types of cells available at the Northern Regional Jail. Isolation housing is generally provided in the holding cells located in the booking area. There is heavy inmate and pedestrian traffic in this area and the cells "have a glass front on these cells. You don't have any

pp. 1348a-1349a).

Ms. Sabo's medical records indicate that she attempted suicide two times in 2000. The first attempt occurred on January 7, 2000, before she was to report to jail after her sentence was reinstated. *Sabo Deposition at pp. 22-23 (App., Vol. II, pp. 295a-296a).* Ms. Sabo does not allege that this suicide attempt occurred in any way as a result of her housing or treatment at the Northern Regional Jail. The second suicide attempt occurred on September 24, 2000. However, Ms. Sabo was not incarcerated on September 24, 2000 or on September 23, 2000. *Individual history for Sabo (App., Vol. III, pp. 1309a-1310a).* Ms. Sabo's medical records indicate that she became upset with her paramour in the evening of September 23 and attempted an overdose of Ambien. *Northwood Health System records (App., Vol. III, p. 1311a).* Progress Notes at the hospital on September 24, 2000 and September 25, 2000 note that her drug overdose suicide attempt pertained to conflicts with her boyfriend. *Northwood Health System records (App., Vol. III, p. 1312a-1313a).* Accordingly, the documented suicide attempts do not show that Ms. Sabo attempted suicide as a result of her complaints regarding medications or her housing assignments during her periodic incarcerations at the Northern Regional Jail. Dr. Goodrich testified that the only stressor mentioned prior to the September 2000 suicide attempt was her boyfriend. *(App., Vol. III, pp. 1346a).*

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privacy for anything you do. Bathroom, et cetera." The other type of cell is located in the general population. These cells have doors with a small window on the door. "So if a person you see needs time out, time alone, they can have it simply by pulling the door shut...they are by themselves... They realize, well I can go in my cell and pull the door shut. It's something that's not hard for anyone to understand." *(App., Vol. I., pp. 213a-214a).*

SUMMARY OF ARGUMENT

Petitioner Sabo has alleged constitutional claims against Respondents Canterbury and Spencer in relation to her periodic incarceration at the Northern Regional Jail. However, the evidence developed in this matter does not support any allegation of wrongdoing by Canterbury, Spencer, or any jail employee. On the contrary, the overwhelming evidence demonstrates that Ms. Sabo's constitutional rights, health, and well-being were protected each time she presented herself to serve her two day per week sentence over 91 weeks. The jail documentation establishes that she received her prescription medication while incarcerated.[10] Further, Ms. Sabo suffered no physical or psychological injuries while serving her time in jail, nor did Ms. Sabo suffer an increased risk of a physical or psychological injury while serving her time in jail. In fact, Dr. Goodrich testified in regard to his note dated February 29, 2000 that Ms. Sabo was doing well serving the weekends in jail and was comfortable with her current roommate. *(App., Vol. III, p. 1338a)*. Thus, Ms. Sabo cannot establish any injury, constitutional or otherwise, or any other damages relating to her incarceration.

Accordingly, the Petitioner cannot prove an Eighth Amendment civil rights claim because she cannot prove an objective deprivation of a basic human need that was sufficiently serious, or that Canterbury and Spencer

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[10] The Petitioner asserts at page 12 of the Petition that the LPN supervisor admitted that the charting could be interpreted to reflect that Sabo did not receive her medications regularly. However, this assertion does not accurately reflect the testimony of the medical administrator Kandi Blake. Ms. Blake testified she could not state that Sabo was not getting her 2:00 p.m. medication. *(App. Vol. III, p. 1258a)*.

subjectively acted with deliberate indifference to such basic human need deprivation. Also, there is no evidence that would cause Canterbury and Spencer to lose the qualified immunity provided to governmental or public officials. As such, the Respondents are entitled to judgment as a matter of law.

STANDARD OF REVIEW

28 U.S.C. § 1254 (1): "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods: (1) by Writ of Certiorari granted upon the Petition of any party of any civil or criminal case, before or after rendition of judgment or decree."

REASONS FOR DENYING THE PETITION

I. The district court correctly granted summary judgment to Canterbury and Spencer in finding that Tammy Sabo failed to establish a violation of her Eighth Amendment right against cruel and unusual punishment pursuant to 42 U.S.C. §1983 while she was periodically incarcerated at the Northern Regional Jail. The United States Court of Appeals for the Fourth Circuit correctly affirmed the judgment of the District Court.

Ms. Sabo alleges that she suffers from psychological illnesses, including panic disorder, moderate agoraphobia and social phobia. She maintains that she did not properly receive medical care related to administration of her afternoon prescription nerve medication in either failing completely or to timely provide the medication. Ms. Sabo further alleges that her medications were crushed, were not always provided with food, and with too little water. The Petitioner also alleges her confinement conditions were inappropriate because she was not always isolated during her intermittent sentence and was placed with the general population despite an

encouragement by her treating physician that she remain isolated.

Despite Ms. Sabo's allegations of violations of her civil rights, the developed evidence simply fails to support any of Ms. Sabo's alleged claims. Ms. Sabo's claim for violation of her civil rights is brought pursuant to 42 U.S.C. §1983 which mandates liability for deprivation of rights, privileges, or immunities secured by the United States Constitution. Ms. Sabo's allegations stem from an alleged violation of the Eighth Amendment's prohibition against "cruel and unusual punishment" made applicable to the States through the Fourteenth Amendment.

The United States Supreme Court first addressed the issue of "cruel and unusual punishment" in the context of a prisoner's claim of inadequate medical care in the case of *Estelle v. Gamble*, 429 U.S. 97 (1976). Within that opinion, the Court held that "punishments...which involve the unnecessary and wanton infliction of pain" violate the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)*(internal citations omitted)*. In this respect, the Court established the standard that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment." *Id.* at 104-105.

In order to establish this type of Eighth Amendment violation, a prisoner must establish

> (1) that objectively the deprivation of a basic human need was "sufficiently serious," and
>
> (2) that subjectively the prison official acted with a "sufficiently culpable state of mind."

Wilson v. Seiter, 501 U.S. 294, 298 (1991).

A. Failure to provide evidence of objective deprivation of basic human need which was sufficiently serious.

In her civil rights claim, Ms. Sabo must first establish the objective component that the alleged deprivation of medical care and/or confinement conditions was "sufficiently serious." "[O]nly extreme deprivations are adequate to satisfy the objective component of an Eighth Amendment claim regarding conditions of confinement. In order to demonstrate such an extreme deprivation, a prisoner must allege 'a serious or significant physical or emotional injury resulting from the prisoner's exposure to the challenged conditions, or demonstrate a substantial risk of such serious harm resulting from the prisoner's exposure to the challenged conditions." *De'Lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003)*(internal citations omitted)*.

Ms. Sabo cannot establish the first prong of an Eighth Amendment claim that objectively the deprivation of a basic human need was "sufficiently serious." The facts developed in discovery do not support Sabo's claims and indeed Sabo cannot show serious or significant physical or emotional injury resulting from the challenged conditions. *See: De'Lonta v. Angelone*, 330 F.3d 630, 634(4th Cir. 2003).

Ms. Sabo has testified that she has not incurred any medical expenses related to not getting her medication in a timely manner. She never had to go to the hospital after she got out of jail at the end of any incarceration period and after being in the general population. She never had to go to the doctor because of being placed in a cell with other women. She never received treatment from her psychiatrist or other doctor after getting out of jail at the end of any two day stint. She is not receiving any medical or psychiatric treatment that she believes is related to serving the time in jail or the way she was treated in jail. *Sabo Deposition at pp. 85, 87-88, 94,*

102, 113 (App. Vol. II, pp. 358a, 360a-361a, 367a, 375a, 386a). Ms. Sabo simply cannot meet this serious or significant physical or emotional injury element of her claim.

The evidence also rebuts Ms. Sabo's allegation that she was subjected to a substantial risk of serious harm by not isolating her on every occasion that she presented herself to the Jail. Specifically, and as found by the district court:

> [T]he physical and psychological evaluations of Sabo upon arrival, the suicide watch, the regular distribution of Sabo's medication, the lack of grievance on the part of Sabo, and the actual nature of facilities available at the Northern Regional Jail all indicate that Canterbury and Spencer established and maintained reasonable conditions for Sabo in light of her mental and physical health, and the exigencies of time and circumstance.

Memorandum Opinion and Order Granting Motion for Summary Judgment at p. 17 (App., Vol. III., p. 1426a). Despite the Petitioner's assertions otherwise, the District Court did contemplate whether Ms. Sabo was at an increased risk because of a deprivation of a basic human need that was sufficiently serious. In a footnote on Page 8 of the Order, the District Court wrote "this Court agrees with the plaintiff that psychological complications that reasonably created a known risk of suicide are serious medical needs." *(App., Vol. III, p. 417a).* The District Court then stated that while plaintiff could show serious mental complications, there is insufficient evidence to show that any complications or increased risk were caused by the medication and housing decisions made at the jail. According to the District Court "the letters only show that Sabo had severe mental issues going into the Northern Regional Jail." Id. The Court continued,

> "Further undermining the causation element in this case is the fact that Sabo was only in the Northern Regional Jail for two days of every week during her period of incarceration. The parties agree that no suicide attempts occurred while she was actually in custody of the Northern Regional Jail. See: Pl.'s reply to defs.' Supp. Mot. at 11-12. Indeed, the plaintiff herself was even unsure if her suicide attempts were caused by conditions in the Northern Regional Jail." *(App., Vol. III, p. 1418a)*"

The evidence is clear that Ms. Sabo was provided with appropriate medical care and confinement conditions. Ms. Sabo admits that she saw a nurse on every admission to the jail. On every incarceration occasion, the nurse would perform physical and psychiatric evaluations, including whether or not Ms. Sabo was suicidal. *Prime Care medical documentation (App., Vol. II, pp. 429a-670a).* Additionally, the booking officer would question and evaluate the inmate at the time of booking to determine the appropriate classification. *Jail documentation (App., Vol. II, pp. 389a-428a).* Indeed, on several occasions, it was determined that Ms. Sabo was suicidal when she presented herself to the jail and was kept in a holding cell under suicide watch with 15 minute periodic observations by jail personnel. *Jail documentation (App., Vol. II, pp. 832a-860a).* There is simply no evidence that Ms. Sabo suffered any injury during any of her incarcerations. The evidence also shows that Ms. Sabo regularly received her medications while she was serving her sentence. *Prime Care Medical documentation (App., Vol. II, pp. 861a-892a).* Further, the jail personnel accommodated Sabo's purported medical conditions by agreeing to allow her to serve her 2 day per week sentence on Wednesdays through Fridays so that a psychologist could be available, if needed. Also, there was no record of any

grievance by Ms. Sabo of any kind, including failure to receive medications in a timely manner or pertaining to her housing classification. Additionally, at the Northern Regional Jail, if an inmate wants to see a doctor, they can simply press a button in their pod (jail area) and inform the guard of that need. *Canterbury Deposition at p. 45 (App., Vol. I, p. 170a).* There is no record that Ms. Sabo undertook this option to obtain medical treatment.

As the U. S. District Court stated in its Order Granting Summary Judgment, "...the plaintiff must do more than simply 'allege' a serious or significant physical or emotional injury resulting from a severe deprivation. Plaintiff must set forth specific facts showing that there were serious or significant deprivations that resulted in physical or emotional injuries, and that such injuries were caused by the alleged deprivation. The plaintiff does not make the requisite showing that her injuries were caused by deprivations in the Northern Regional Jail or that the deprivations themselves were severe." *Memorandum Opinion and Order Granting Summary Judgment at p. 8 (App. Vol. III, p. 1417a).*

Ms. Sabo cannot prove objectively that the Respondents deprived her of a sufficiently serious basic human need and acted in such a manner as to deprive Ms. Sabo of necessary and adequate medical care and/or confinement conditions, thereby endangering her health and well-being.

Turning to the Petitioner's allegation that the failure of policies and procedures by the Respondents at the Jail allegedly caused an objective and sufficiently serious deprivation of a basic human need of Ms. Sabo , the jail documentation regarding booking procedures as well as the initial nurse's evaluations upon booking indicate that there is a reasonable policy in place to evaluate the mental health and physical health of an inmate prior to housing assignment. *Jail*

documentation (App. Vol. II, 389a-670a). Additionally, there is a program at the Jail that if someone has a medical condition when they present to the jail, the jail will not accept them until they are evaluated by a physician and receive a doctor's approval for incarceration. *Canterbury Deposition at pp. 28-32 (App., Vol. I, pp. 153a-157a).* This policy was never applicable during the sentence at issue because Ms. Sabo never had an occasion where she presented at the Jail for a two day incarceration with a sufficiently serious medical condition. However, there is evidence of the application of this policy in Ms. Sabo's prior record from a previous incarceration. *Prime Care Medical Dispensary Cards (App., Vol. III, pp. 1003a-1006a).*

Turning to the issue of training[11], the employees of the Regional Jail receive extensive training which includes 120 hours of initial training with refresher training of 40 hours per year. This training includes intake/release procedures, inmate supervision/discipline, inmate rights and responsibilities and suicide/mentally ill inmates. *Jail documentation (App., Vol. II., pp. 671a-699a).* Respondent Canterbury testified "...We give a suicide prevention class so they have some sort of notion of what to look out for and we have had some suicides in the jails. That is one of the unfortunate circumstances of jails." *(App. 1, p. 157a).*

Additionally, Prime Care, the contract medical provider at the Jail is accredited by the National Commission of Correctional Health Care. This accreditation means that Prime Care's practices and procedures meet the requirements

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[11] At page 10, letter (c) of the Petitioner's Petition, she alleges the Respondents "have failed to instruct, supervise, or train their employees and agents in such a manner as to assure the delivery of adequate medical care to Petitioner..." See: Petitioner's Petition for Writ of Certiorari at page 10.

of this National Commission. *Canterbury Deposition at p. 27 (App., Vol. I, p. 152a) and Certificates of Accreditation (App., Vol. III, pp. 1134a-1141a).* By virtue of the implementation of the policies and procedures required by the National Commission, Tammy Sabo's health care needs were specifically assessed and addressed each time she presented to the Jail to serve her sentence.

Accordingly, no rational finder of fact could determine that an objective deprivation of a basic human need occurred, let alone one that was "sufficiently serious" to rise to the level necessary to demonstrate cruel and unusual punishment. Based on the uncontroverted evidence developed in this matter, the District Court's Order, which was affirmed by the United States Court of Appeals for the Fourth District, finding that Ms. Sabo has failed to prove the objective prong of an Eighth Amendment was clearly within the applicable constitutional standards of Eighth Amendment law.

B. Lack of deliberate indifference by Spencer and Canterbury.

Ms. Sabo also cannot establish the second prong necessary for a §1983 claim; that is, that Canterbury and Spencer subjectively acted with a "sufficiently culpable state of mind." If and only if Sabo can establish the objective prong of her Eighth Amendment claim, should the Respondents' states of mind come into issue. Assuming *arguendo*, that Sabo had met the objective prong, Sabo must next demonstrate that the Respondents' respective states of mind were "sufficiently culpable." There is no evidence that Mr. Canterbury had any personal knowledge of Ms. Sabo and her incarceration. *Canterbury Deposition at pp. 56, 144 (App., Vol. I., pp. 181a, 269a).* Also, Mr. Spencer did not have any direct involvement in the day-to-day incarceration decisions regarding Ms. Sabo. *Spencer Deposition at pp. 51-*

52, 71, 81-83 (App., Vol. II., pp. 750a-751a, 770a, 780a-782a). Thus, the only manner for Ms. Sabo to prove the subjective prong of this claim is to prove that the Respondents acted with deliberate indifference. Estelle v. Gamble, 429 U.S. 97 (1976), Miltier v. Beorn, 896 F.2d 848 (4th Cir. 1990).

"'[D]eliberate indifference entails something more than mere negligence . . . [but] is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.' It requires that a prison official actually know of and disregard an objectively serious condition, medical need, or risk of harm." De'Lonta v. Angelone, 330 F.3d 630, 634 (4th Cir. 2003). A prison official "must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). "With deliberate indifference lying somewhere between the poles of negligence at one end and purpose or knowledge at the other, the Courts of Appeals have routinely equated deliberate indifference with recklessness." Id. at 836.

In this case, Ms. Sabo is asserting that she failed to receive medications in a timely and appropriate manner as well as not being placed in a suitable housing classification by placement in the general population instead of in isolation. The evidence relevant to this issue clearly indicates that Canterbury and Spencer did not exhibit deliberate indifference. Initially, there is no evidence that Canterbury had any knowledge of or involvement in the medication and housing issues of Ms. Sabo *Canterbury Deposition at p. 144 (App. Vol. I., p. 269a)*. Also, the evidence is that while Mr. Spencer may have had knowledge of the Dr. Goodrich letters of encouragement, he did not involve himself in providing medication to or making the specific housing decisions with

respect to Ms. Sabo. *Spencer deposition at pp. 81-83 (App. Vol. II, pp. 780a-782a).* Rather, the Respondents relied on staff to follow policies in making decisions regarding Sabo's incarceration.

As previously stated, Magistrate Humway entered a "Medication Order" in December 1999 ordering the Jail "...to comply with the medical orders/requests and provide prescription medication to Tammy Sabo from her treating physician Warren Goodrich, D.O. of Northwood Health Systems." *See: (App., Vol. I., pp. 72a-73a).* The developed evidence clearly indicates that Sabo was regularly provided her medications. *Prime Care Medical documentation (App., Vol. II., pp. 861a-892a).*

Ms. Sabo relies upon the two letters written by Dr. Goodrich addressed "To Whom It May Concern" to assert that Dr. Goodrich ordered that Ms. Sabo be placed in isolation during her confinement. This argument fails to meet the level of deliberate indifference for several reasons. Initially, the operative portion of the December 3, 1999 letter of Dr. Goodrich states "...it would be of utmost benefit if consideration could be given to keeping her [sic] isolation during the time of her confinement." *December 3, 1999 letter (App., Vol. III., p. 1142a)(emphasis supplied).* Additionally, Dr. Goodrich's letter of February 29, 2000 in its operative portion states, "...please encourage isolation in order to maintain this patient's current level of mental health." *February 29, 2000 letter (App., Vol. III., p. 1143a)(emphasis supplied).* These letters are clearly not orders, but are merely suggestions or encouragements. Dr. Goodrich's own testimony supports this position. Dr. Goodrich agreed that he encouraged consideration of isolation and that he had no authority to order isolation. *Goodrich Deposition at p. 89 (App., Vol. III, p. 1402a).*

The developed testimony in this case is that these letters were received and were considered by the staff at the Jail. Additionally, the staff members who reviewed the letters all uniformly indicated that these letters did not constitute orders by a physician. *Spencer Deposition at pp. 53-54, 61, 66-68 (App., Vol. II., pp. 752a-753a, 760a, 765a-767a) and Murrin Deposition at pp. 47-48, 57 and 103 (App., Vol. III, pp. 940a-941a, 950a, 996a).* The undisputed evidence is that on each occasion that Ms. Sabo presented herself for her intermittent incarcerations, the policy of the Jail was followed and Ms. Sabo was evaluated by trained correctional officers as well as trained medical personnel to determine the appropriate housing decision for Ms. Sabo on each particular occasion.

Also, as further consideration of Dr. Goodrich's letters, Shar Murrin, Director of Inmate Services for the Regional Jail, contacted Magistrate Humway to discuss the Medication Order and to inform Humway of the Jail's housing classification actions with respect to Tammy Sabo. Magistrate Humway agreed with the procedures of the Jail in this manner. *Murrin Deposition at pp.74, 77-78, 81 (App., Vol. III, pp. 967a, 970a-971a, 974a).*

Additionally, when considering the housing of an inmate truly diagnosed as agoraphobic as asserted in the letters of Dr. Goodrich, the uncontroverted evidence is that the most favorable housing for such an inmate would be in general population. Even Dr. Goodrich, upon hearing the description of the types of cells available to house Tammy Sabo, agreed that a cell in the general population would better serve her medical conditions than the "isolation" cells available at the Northern Regional Jail. *Goodrich Deposition at pp. 35-36 (App., Vol. III, pp. 1348a-1349a).*

Further, even prison officials who acknowledge a substantial risk to inmate health or safety "may be found free from Eighth Amendment liability, for failure to protect inmates from harm, if officials responded reasonably to risk, even if harm ultimately was not averted." *Farmer v. Brennan*, 511 U.S. 825, 844 (1994). "Whether one puts it in terms of duty or deliberate indifference, prison officials who act reasonably cannot be found liable under the cruel and unusual punishment clause." *Id.* at 845. Even if by some stretch of the imagination, Sabo successfully proved that the conditions of which she complains constituted a substantial risk to her health, Canterbury and Spencer's reasonable actions in implementing policies to assess and address any alleged risk as described above and through the repeated mental health evaluations would negate any liability under the Eighth Amendment.

Under the developed factual circumstances and as a matter of law, Ms. Sabo cannot provide evidence to show that there was deliberate indifference by Canterbury and/or Spencer as it pertains to providing medications and/or housing to Ms. Sabo. Under these circumstances, the Petitioner cannot prove the second subjective prong of an Eighth Amendment claim and summary judgment was appropriately granted on this issue.

II. The district court correctly held that Canterbury and Spencer were entitled to qualified immunity with respect to the claims asserted by Tammy Sabo pursuant to 42 U.S.C. §1983 in finding that even if Tammy Sabo had established a constitutional violation, the conduct of Canterbury and Spencer did not create a pervasive and unreasonable risk of constitutional injury.

In its Order Granting Summary Judgment, the district court noted that because the court had found that Ms. Sabo's constitutional rights were not violated, the analysis could end there. However the court continued and found that even had a constitutional right been violated, the conduct of the Respondents would still fall under the protection of the doctrine of qualified immunity. *Memorandum Opinion and Order Granting Motion for Summary Judgment at p. 15 (App., Vol. III., p. 1424a).*

It is well established that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Pritchett v. Alford*, 973 F.2d 307 (4th Cir. 1992).

In this case, Canterbury and Spencer were not directly active or involved in the complained of activities pertaining to the incarceration of Ms.Sabo. Therefore, in order for Sabo to defeat the application of qualified immunity to these two supervisors, Ms. Sabo must show "...1) the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed a 'pervasive and unreasonable risk' of constitutional injury to citizens like the plaintiff; (2) the supervisor's response to that knowledge was so

inadequate as to show 'deliberate indifference to or tacit authorization of the alleged offensive practices'; and (3) there was an 'affirmative causal link' between the supervisor's inaction and the particular constitutional injuries suffered by the plaintiff." Shaw v. Stroud, 13 F.3d 791 (4th Cir. 1994), *cert. denied* 513 U.S. 813 (1994). Based on the facts that have been developed in this case, Ms. Sabo cannot prove any of these elements and therefore the Respondents are accorded qualified immunity for the claims of Ms. Sabo.

The Shaw case stated that to establish a "pervasive and unreasonable risk of" constitutional injury, the alleged conduct must be so widespread that the conduct by the subordinates pose an unreasonable risk of harm to or constitutional injury to the protected party. Shaw at 799. In this case, there is absolutely no evidence of a pervasive and unreasonable risk of harm to Ms. Sabo and further there is no evidence that a pervasive and unreasonable risk of harm was so widespread that it posed an unreasonable risk of harm or constitutional injury to the protected party. Rather, as described above, the uncontroverted evidence is that Ms. Sabo was evaluated by health care individuals as well as correctional facility employees upon each of the 91 two-day incarcerations. Decisions were made regarding housing on each individual incarceration. The record clearly shows that the plaintiff was provided her medications on a regular basis. Even the Petitioner admits that she did not suffer any injuries while incarcerated or that she needed any mental health or medical attention during the five days of any week that she was outside of the Correctional Facility

The District Court found that "the choice to keep the prisoner in the general population was not a severe deprivation, but a choice made by prison personnel in the plaintiff's best interest." *(App., Vol. III, p. 1420a)*. The District Court found "the physical and psychological

evaluations of Sabo upon arrival, the suicide watch, the regular distribution of Sabo's medication, the lack of grievance on the part of Sabo, and the actual nature of facilities available at the Northern Regional Jail all indicate that Canterbury and Spencer established and maintained reasonable conditions for Sabo in light of her mental and physical health, and the exigencies of time and circumstance. Accordingly, both Canterbury and Spencer are protected by qualified immunity." *(App., Vol. III, p. 1426a).*

Simply, there is no evidence to show that Canterbury or Spencer had actual constructive knowledge that a subordinate was engaging in conduct that posed a "pervasive and unreasonable risk" of harm or constitutional injury to Sabo. Therefore, Ms. Sabo cannot show the first element necessary to defeat qualified immunity.

Ms. Sabo also cannot prove the second element necessary to defeat qualified immunity as she cannot demonstrate that the Respondents acted with deliberate indifference with respect to providing medication and determining housing for Sabo. In *Shaw*, the Court noted that "a plaintiff may establish deliberate indifference by demonstrating a supervisor's 'continued inaction in the face of documented widespread abuses'". *Shaw*, 13 F.2d at 799. There are no documented widespread abuses in this instance. The factual basis of the jail employees' actions and inactions toward Sabo have been described above and clearly indicate that there were policies and procedures in place to eliminate any unreasonable risk of harm or constitutional injury. The evidence described above is replete with information that Sabo received medical evaluations, her prescribed medications and was evaluated for a housing assignment on every occasion that she presented herself to the jail to serve her sentence.

As Ms. Sabo admits that she did not suffer injury and is therefore unable to show any injury suffered from her incarceration at the Jail, she also is unable to prove the third element described by the Court in *Shaw* relating to an affirmative causal link between the supervisor's alleged inaction and the alleged constitutional injury.

For the above stated reasons, the district court correctly found that the Respondents are entitled to the application of the doctrine of qualified immunity defeating Sabo's civil rights' claims against them.

III. Petitioner's misstatements of facts.

Despite the clear factual record related herein, Ms. Sabo posits several arguments within her petition which inaccurately present the evidence and testimony in this matter. Initially, the Petitioner presupposes that the Medication Order issued by Magistrate Humway encompasses and incorporates the December 3, 1999 and February 29, 2000 Goodrich letters which encourage isolation. As stated herein, all parties who reviewed these Goodrich letters, including the District Court, did not believe they constituted a medical order. Dr. Goodrich confirmed and acknowledged that the letters were an encouragement and that he had no authority to order isolation for Ms. Sabo. Thus, Ms. Sabo cannot establish this point and more importantly cannot establish that the Respondents interpreted the Medication Order in this manner such that the Respondents could have subjectively disregarded the Order. For this reason, Ms. Sabo's entire argument in this matter is seriously flawed.

Ms. Sabo improperly extends the argument that the February 29, 2000 letter was incorporated into the Medication Order into the next factual inaccuracy, alleging that the testimony of James Spencer establishes that orders are not routinely followed at the Northern Regional Jail. However,

this assertion is easily rebutted by examining the deposition testimony of Mr. Spencer.

First and foremost, Mr. Spencer did not testify that he believed the letters from Dr. Goodrich constituted an order or request. Mr. Spencer testified that he believed the letters from Dr. Goodrich constituted suggestions not requests. He also testified that he believed that the Northern Regional Jail made every attempt and did comply with Magistrate Humway's Medication Order. Mr. Spencer also believed that the letters authored by Dr. Goodrich were suggestions. *Spencer Deposition at Page 61 (App. Vol. II, pp. 760a).* Further, Mr. Spencer stated that if the order from the Magistrate would have stated they needed to house her by herself they would have complied. *Spencer Deposition at pp. 57, 61, 67-68 (App. Vol. II, pp. 756a, 760a, 766a-767a).*

The Petitioner cites page 57 of Spencer's deposition for the proposition that the jail routinely does not follow judicial orders. However, this assertion also is untrue. The testimony of Mr. Spencer at page 57 of his deposition does not pertain to the Medication Order and rather discusses the content of the Goodrich letters. Page 57 *(App., Vol. II, p. 756a).*

The cited testimony fails to establish that the Jail routinely fails to follow orders by physicians, the Court, or otherwise. Rather, Mr. Spencer testified that he considered Dr. Goodrich's letters to be suggestions which the jail considered but did not implement. Judge Stamp agreed that the letters were not a part of the medication order. "The plaintiff relies on the assumption that Dr. Goodrich's letters and Magistrate Humway's Order required Sabo's placement in isolation. This interpretation is contrary to the plain language of these documents. Dr. Goodrich's first letter asks the jail officials

to "consider" isolation and a second letter merely "encourages isolation." ..." *(App., Vol. III, p. 425a)*.

Additionally, Mr. Spencer did not acknowledge "that he should have obtained and followed a physician's medical opinion" with respect to the housing of Tammy Sabo, as improperly asserted by the Petitioner. *See: Sabo's Petition at p. 6.* There is no factual support cited by Ms. Sabo to support this assertion. Rather, Mr. Spencer testified that if there was a medical issue he would get with the medical staff. *Spencer Deposition at p. 54 (App., Vol. II., p. 753a).* The clear policy of the jail was to evaluate an inmate for medical purposes upon each incarceration and this evaluation of Sabo was performed by Prime Care nurses who provided medical care at the Jail. *Prime Care Receiving Screening/Health Assessment documents (App., Vol. II, pp. 429a-602a); Prime Care Intake Mental Health Screening documents (App., Vol. II, pp. 603a-670a).* This policy was followed and Ms. Sabo was evaluated each and every time she presented herself to the jail.

Petitioner next improperly alleges that the Northern Regional Jail engages in *ex parte* contact with the Court in an attempt to modify or usurp existing Court Orders, depriving inmates of due process. Again, the testimony relied upon in support of this assertion does not support this proposition. Ms. Sabo cites the testimony of Executive Director Steven Canterbury in this regard. In examining the cited portions, it is clear that Mr. Canterbury testified that judges and magistrates are informally consulted by telephone on administrative matters with regard to Court Orders. *Canterbury Deposition at pp. 67-68, 131 (App., Vol. I., pp. 256a, 766a-767a).*

If an issue regarding language in an Order cannot be resolved by conversation with the judicial officer, Mr.

Canterbury testified that it was the Jail Authority's policy to take the matter to Court. *See: Canterbury Depo. At pp. 128-129. (App., Vol. I, pp. 253a-254a).* Accordingly, it is clear that Mr. Canterbury did not testify that he has implemented a policy of contacting judicial officers in an attempt to modify or usurp existing court orders. Rather, Mr. Canterbury explained that a judge or magistrate may be contacted in order to clarify an administrative question. Therefore, Ms. Sabo's transparent attempts to create a risk of constitutional injury is contrary to the developed evidence and must fail.

CONCLUSION

The Respondents respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully Submitted

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